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IN THE
Supreme Court of the United States

OFFICE OF THE CLERK

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY AND LAURA J. SWARTZENBERG,
Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000; AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 23(g)(1) provides in pertinent part: "*Appointing Class Counsel.* [A] court that certifies a class must appoint class counsel. In appointing class counsel, the court: . . . (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."

1. Are the ideological views of a public-interest legal aid organization that is providing the attorneys for a class action pertinent to the individual counsel's ability to fairly and adequately represent the class?

2. If so, does denial of class-counsel status based upon the funding legal organization's ideological views violate the First Amendment rights of the attorneys and their clients who associate with the organization?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

SPECIAL NOTIFICATION

A copy of this Petition will be served on the Solicitor General of the United States because 28 U.S.C. § 2403(a) may apply.

CORPORATE LISTING

No corporate disclosure statement is required because no Petitioner is a corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners David H. Scheffer, Mary C. Bergevin, Joseph L. Stephany and Laura J. Swartzenberg respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion, Appendix ("App.") A, *infra* 1a, is reported at 610 F.3d 782 (2d Cir. 2010). The decision and order of the United States District

Court for the Western District of New York denying the appointment of class counsel, App. B, *infra* 29a, is unreported.[1] Also unreported are: the district court's decision and order denying rehearing of its denial of class counsel and clarifying its class counsel ruling, App. E, *infra* 49a; the district court's two letter orders substituting another attorney for plaintiffs' chosen counsel, App. C, *infra* 45a, and App. D, *infra* 47a; and, the district court's order denying leave to file a supplemental complaint, App. F, *infra* 59a.

JURISDICTION

The Second Circuit issued its opinion on June 28, 2010. App. A at 1a. Petitioners filed a timely petition for rehearing on July 12, 2010, which was denied on August 31, 2010. App. G at 61a. This petition is timely under Supreme Court Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1). Counsel has made the notification required by Supreme Court Rule 29.4(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

First Amendment

The **First Amendment** provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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[1] The district court's summary judgment opinion on the merits appears at 2007 WL 2126286 (W.D.N.Y. July 25, 2007), but is not officially reported.

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

RULE 23

Class Actions

Rule 23(g) provides:

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.

STATEMENT OF THE CASE

Specific rules governing the appointment of class counsel were added to the Federal Rules of Civil Procedure on December 1, 2003. Fed. R. Civ. P. 23(g). This Court has not yet interpreted those rules.

Hundreds of public-interest legal aid organizations, covering all points of the ideological compass, make access to the courts possible to those individuals without financial means.[2] Consider what important decisions would be absent from the law were it not for the American Civil Liberties Union ("ACLU"), Institute for Justice, Legal Aid Society, NAACP Legal Defense & Education Fund ("NAACP"), and National Right to Work Legal Defense Foundation ("Foundation"), to name a few such organizations. Many such organizations support class-action litigation to provide relief for large numbers of individuals at the lowest cost possible.[3] Like any other charitable legal aid organization, the Foundation has a viewpoint, informs the public and its supporters of its work, and provides attorneys for class-action lawsuits. Similarly, the NAACP was not only interested in winning the school desegregation case for plaintiffs and class members, but also in educating the public about eradicating racial discrimination.[4]

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[2] D.L. Rhode, "Public Interest Law: The Movement at Midlife," 60 Stan. L. Rev. 2027 (2008).

[3] *NAACP v. Devine*, 727 F.2d 1247, 1260-61 (D.C. Cir. 1984) (legal foundations "can aid the greatest number of individuals by pursuing relief for a class of individuals").

[4] *See* NAACP LDF History, http://naacpldf.org/history (last visited Nov. 19, 2010).

This case presents the question whether Rule 23(g)(1)(B) or the First Amendment restrains judges from considering the ideological views of the supporting legal aid organization in deciding whether to appoint individual class counsel.

A. The Facts

Petitioners are probation officers employed by Monroe County, New York. App. A at 2a. They work in a bargaining unit represented by Respondent Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO ("CSEA" or "the union"), which is designated as the exclusive collective bargaining representative for certain Monroe County employees.[5] App. A at 2a, 3a; see also N.Y. Civ. Serv. Law § 204(2).

In public-sector unionized workplaces, New York law requires local government employers to deduct an amount equivalent to full union dues from nonunion employees and remit the money to their exclusive bargaining representative. App. A at 3a-4a; N.Y. Civ. Serv. Law § 208(3)(b). Under the U.S. Constitution, nonunion employees are entitled to receive a notice that includes an independently audited breakdown of the union's chargeable expenses (those related to collective bargaining) and nonchargeable expenses (those unrelated to collective bargaining). App. A at 4a; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306-07 & n.18 (1986). A union cannot charge objecting nonmembers for nonchargeable expenses, and objecting nonmembers are entitled to an advance reduction of the fee. *Id.* at 301-02, 305-06.

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[5] While CSEA represents over 200,000 employees in New York State, 18,700 are nonmembers who would be in the putative class App. A at 3a-4a.

In this case, CSEA decided that its administrative subdivisions need not be subject to an independent audit of their chargeable and nonchargeable expenditures. App. A at 5a-6a. CSEA also decided to charge 95% of its organizing expenses to objecting nonmembers. *Id.* at 5a.

The Foundation provides free legal aid to individual employees suffering the abuses of compulsory unionism. It is a bona fide, independent, public-interest, tax-exempt, legal aid organization.[6] Foundation supported lawyers have successfully litigated most of this Court's cases establishing the constitutional and statutory rights of employees required to pay compulsory fees to labor unions.[7] Like other legal aid organizations, the Foundation employs or provides attorneys who establish personal attorney-client relationships and provide representation to individual clients. When appropriate, Foundation staff and local attorneys, like those from other public-interest organizations, file class actions for their individual

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[6] *UAW v. Nat'l Right to Work Legal Def. & Educ. Found.*, 781 F.2d 928, 932-35 (D.C. Cir. 1986) (Foundation is "a bona fide, independent legal aid organization"); *National Right to Work Legal Def. & Educ. Found. v. United States*, 487 F. Supp. 801 (E.D.N.C. 1979) (Foundation is a charitable, public-interest organization exempt from taxation under 26 U.S.C. § 501(c)(3)).

[7] *See, e.g., Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007) (class action); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1998); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (class action); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U S. 292 (1986) (class action); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (class action); *Abood v. Detroit Bd. of Educ* , 431 U.S. 209 (1977) (class action).

clients and request class certification and appointment as class counsel.

Throughout this case, Milton Chappell and John Martin, Foundation staff attorneys, represented the probation officers,[8] *id.* at 2a; App. B at 40a, with Laurence Oppenheimer, a partner at Hiscock & Barclay, LLP, serving as local counsel. Chappell and Martin investigated, identified and filed the employees' claims against the union. They vigorously litigated the instant action in the district court, including hiring an expert witness to rebut CSEA's expert witness.

Nine federal courts have approved Chappell as class counsel in union fee cases.[9] For thirty-four years, he has been lead trial and/or appellate counsel

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[8] Martin, now in government service, represented plaintiffs in the district court and through the briefing stage in the Second Circuit. App. A at 2a; App. B at 40a.

[9] *Swanson v. Univ. of Haw. Prof'l Assembly*, 212 F.R.D. 575, 577 (D. Haw. 2003); *Wagner v. Prof'l Eng'rs*, No. CIV 2-00-1692, 2002 WL 398818, at *1 (E.D. Cal. Feb. 22, 2002); *Baird v. Cal. Faculty Ass'n*, No. CIV.S-00-0999, 2000 WL 1028782, at *6-*7 (E D. Cal. July 13, 2000); *Friedman v. Cal. State Employees Ass'n*, No. CIV S000101, 2000 WL 288468, at *6 (E.D. Cal. Mar. 15, 2000); *Murray v. Local 2620, Dist. Council 57, AFSCME*, 192 F.R.D 629, 635-36 (N.D. Cal. 2000); *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 940 (C.D. Cal. 1990); *Hohe v. Casey*, 128 F.R.D. 68, 70 (M.D. Pa. 1989); *Damiano v. Matish*, 644 F. Supp. 1058, 1059-60 (W.D. Mich. 1986); *George v. Baltimore City Pub. Sch.*, 117 F.R.D. 368, 371 (D. Md. 1987).

in at least thirty-one reported cases involving union nonmembers. Chappell successfully represented the petitioning teachers and class in *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007). He assisted lead counsel in four of this Court's leading cases in this area of the law.[10] Like lawyers associated with other public-interest legal organizations, plaintiffs' attorneys can rely on the Foundation's considerable resources to adequately fund this litigation, including appeals.[11]

The probation officers retained Chappell and Martin, not the Foundation, in this matter. Although Chappell and Martin are Foundation employees, they are members of state bars and have an absolute duty to act in their clients' best interests and, if certified as class counsel, a legal and ethical obligation to protect class interests.[12] Chappell and Martin have sworn under oath that, in the conduct of litigation, they do not take direction from the Foundation, but do what is in their clients' best interest.[13]

B. The Proceedings Below

On December 6, 2005, the probation officers filed a class-action, civil rights complaint, pursuant to 42

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[10] *Ellis, Hudson, Beck*, and *Lehnert* (cited *supra* note 7).

[11] The Foundation "has resources most other attorneys would be unable to muster in representing the class." *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520-21 (D.N.M. 2004).

[12] Foundation staff attorneys "are bound by the same rules of procedure and conduct as are all counsel in federal court actions." *Bromley v. Mich. Educ. Ass'n*, 178 F.R.D. 148, 162 (E.D. Mich. 1998).

[13] *See* App. B at 40a; *accord UAW*, 781 F.2d at 934 (Foundation staff attorney assigned to case makes strategic litigation decisions independently).

U.S.C. § 1983, against CSEA in the United States District Court for the Western District of New York.[14] App. A at 6a; App. B at 29a. They alleged that the union deducted fees from nonmembers' wages without the notice and procedural safeguards required by the First Amendment as set forth in *Hudson*, *supra* at 5, and further that CSEA used fees collected from nonmembers' wages for nonbargaining activities such as organizing. Because CSEA failed to send a *Hudson* notice to every nonmember prior to the fee deduction, the original complaint requested restitution and punitive damages.

On April 5, 2006, plaintiffs moved for class certification of all public-sector employees represented by CSEA who were not union members and a subclass of nonmembers who had specifically objected to the union's use of their money for non-bargaining activities. App. B at 30a. They also sought appointment of their individual counsel, as class counsel under Rule 23(g). *Id.*

In July 2006, seven months after plaintiffs filed suit, CSEA sought to avoid liability by providing a *Hudson* notice to all plaintiffs. The union filed a declaration with the court stating that it had also distributed the notice to all nonmembers. Based on these developments, plaintiffs, on September 27, 2006, moved for leave to file a supplemental complaint, abandoning their original claims for punitive damages and full restitution. App. F at 59a.

On October 24, 2006, the judge denied Chappell and Martin's application to be appointed as class counsel on the grounds that those attorneys "are

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[14] The district court had federal jurisdiction under 28 U S C. §§ 1331 and 1343.

clearly in conflict with the objectives of the plaintiffs and the putative class and cannot act in their best interest" because they are employed by the Foundation.[15] App. B at 43a-44a. Neither the judge nor the union ever contended that plaintiffs' attorneys would litigate ineffectively for the class. The problem was not with attorneys Chappell and Martin, but with the Foundation, the charitable organization that employs them and funds the litigation.[16]

Without any evidentiary hearing or oral argument, the judge held that the "goals of Foundation counsel conflict with the very foundational objectives of [Defendant] CSEA." *Id.* at 42a. The Foundation, according to the judge, has ideological goals adverse to the interests of the class, which he imputed to plaintiffs' attorneys. *Id.* at 35a-43a. He also found that the Foundation "trigger[s] legal attacks that seek to impair the ability of unions to collect agency fees from nonmembers whom they represent in collective bargaining." *Id.* at 35a. He asserted that the "Foundation's real objective is political," not charitable. *Id.*

Of particular concern to the judge was the claim that the Foundation appeared to be against higher taxes.[17] *Id.* at 36a-37a, 39a, 41a-42a. The Foundation,

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[15] The judge also found conflict based on the original claims for punitive damages and full restitution, which plaintiffs had previously abandoned. App. B at 33a, 38a-39a.

[16] The lower courts made a clear factual error by stating at various times that the Foundation applied to serve as class counsel. App. A at 7a n.3, App. B at 30a, 33a, 44a. It neither applied to serve as class counsel, nor could it. Instead, Chappell and Martin applied for appointment App. B at 40a.

[17] The only evidence the district court referenced is the Foundation's views stated in its fund-raising and public relations

the judge said, "seeks to use public employees who are not union members as pawns in litigation that is being conducted in the interest of taxpayers." *Id.* at 39a. He found this contrary to the interests of the probation officers who must favor higher taxes, because public employees are paid by tax revenues.[18] *Id.* at 39a, 42a.

There is no evidence of the attorneys' views on any issue the district court discussed. *Id.* at 40a-42a. Plaintiffs' attorneys were not deposed or asked to produce any documents or answer any interrogatories. Chappell and Martin's declarations are the only evidence of their views. *Id.* They both pledged total fidelity to the best interests of their clients and the class, not to the Foundation, which merely funds the litigation.[19] *Id.* at 40a. Nor is there any evidence of the views of any putative class member—no depositions, declarations, affidavits, or documents.

The judge also supported his consideration of the Foundation's ideological views by relying on *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir. 1989). App. B at 34a-35a, 38a-39a.

> In *Gilpin*, Judge Posner analyzed the problem presented where, as here, named plaintiffs represented by ideologically motivated attorneys

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documents, not the views of Chappell or Martin. App. B at 35a, n.1, 36a-37a, 41a-42a.

[18] The judge ignored the fact that plaintiffs are both public employees and taxpayers.

[19] Plaintiffs filed declarations stating that they have no problem with the fact that Chappell and Martin are Foundation-sponsored attorneys, nor do they mind the Foundation's positions on public issues. They told the court that they wanted their attorneys to continue to represent them and the class. *See* App. D at 47a-48a.

> from the Foundation seek to represent a class of all nonunion employees required to pay agency fees. In affirming a district court's denial of class certification, the Seventh Circuit identified an inherent conflict between the type of claim asserted by the Foundation attorneys and the interests of a substantial number of class members who do not share the Foundation's ideological hostility to unions.

Id. at 34a.[20]

Then, on his own motion, the judge appointed attorney Michael Harren not only as substitute class counsel, *id.* at 43a, but also as plaintiffs' attorney, and *sua sponte* disqualified Chappell, Martin and local counsel from participating in the case. *Id.* at 43a-44a; *see also* App. C at 45a-46a; App. D at 48a. The judge's decision directed Harren to "consult with *named plaintiffs regarding his representation of their interests* and the interests of the putative class in this case." App. B at 43a, 44a (emphasis added). The judge even wrote plaintiffs twice reminding them that he had replaced their attorneys with Harren.[21] App. C at 45a-46a; App. D at 48a.

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[20] In both the instant case and *Gilpin*, the courts' "findings" regarding the Foundation had absolutely no evidentiary basis. When the district court in *Gilpin* denied class certification, no Foundation attorney represented the nonunion plaintiffs. *See Gilpin v. AFSCME*, 643 F. Supp. 733 (C.D. Ill. 1986). Foundation support of the *Gilpin* litigation first occurred at the Seventh Circuit.

[21] "I substituted Mr. Michael Harren as attorney to appear on *your behalf* in th[is] lawsuit. I understand that Mr. Harren contacted you and you do not wish to have him represent you. Understand, that my decision *disqualified your counsel from representing you in this action* . . ." App. C at 45a-46a (emphasis

Harren is one of Rochester's most prominent union lawyers. He has served on the CSEA and AFSCME affiliated AFL-CIO Lawyers Coordinating Committee[22] and represented numerous AFL-CIO affiliates in litigation.[23] AFL-CIO President Richard Trumka has characterized the AFL-CIO Lawyers Coordinating Committee as the "labor movement's lawyers."[24] The Coordinating Committee "has a tradition of taking action . . . to support *organizing* and workers' rights," according to then AFL-CIO General Counsel Jonathan Hiatt.[25] (One issue in this case is whether CSEA may charge objecting nonmembers for organizing. App. A at 2a.)

The judge substituted a lawyer for both the plaintiffs and the class whose record demonstrates that he embraces one of "the very foundational

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added). "[Y]our request that I permit your *current attorneys to continue representing you is denied*. . . . Be advised that if you intend to pursue this case, please have your *substitute counsel* file a notice of appearance with this Court . . . [or I will] dismiss this case without prejudice for failure to prosecute." App. D at 48a (emphasis added).

[22] Michael Harren, Partner, http://www.cdlawyers.com/attorneys.asp?AttorneyID=9 (last visited Nov. 15, 2010).

[23] *See, e.g., Rochester Joint Bd., AFL-CIO v. NLRB*, 896 F.2d 24 (2d Cir. 1990); *In re Reg'l Transit Serv., Inc.*, 267 A.D.2d 941 (N.Y.A.D. (4 Dep't) 1999), *In re NRNH, Inc. (SEIU Dist. 1199-Rochester, AFL-CIO)*, 332 NLRB 300 (2000); *CNP Mech., Inc. (Plumbers Local Union #13)*, No. 3-CA-23731-2, 2004 WL 1468259 (NLRB Div. of Judges June 24, 2004).

[24] Richard L. Trumka, Speech at the Lawyers Coordinating Conference, Boston (May 8, 2000), http://www.aflcio.org/mediacenter/prsptm/sp05082000a.cfm (last visited Nov. 15, 2010).

[25] Jonathan Hiatt, Labor Lawyers Labor in New Orleans, http://blog.aflcio.org/2006/05/11/labor-lawyers-labor-in-new-orleans/ (last visited Nov. 15, 2010) (emphasis added).

objectives" of their union opponent, *i.e.*, union organizing. App. B at 42a. Yet, there is no evidence that any class member believes he or she should be charged for CSEA's organizing expenses. Only after CSEA's request to clarify that Harren had not replaced plaintiffs' attorneys with regard to their own claims did the judge allow plaintiffs' attorneys to resume their individual representation. App. E at 56a, 57a.

The judge held the motion for class certification in abeyance "until the putative class is represented by substitute counsel." App. B at 44a; *see also* App. E at 57a. Two days later, on October 26, 2006, he denied without prejudice plaintiffs' motion for leave to file a supplemental complaint because Harren, who had been appointed "substitute counsel," would have to decide the merits of filing such a motion. App. F at 60a. Harren never established an attorney-client relationship with plaintiffs or the class, and never assumed the role as class counsel.[26] App. E at 57a. The judge never ruled on the motion for class certification.[27]

On July 25, 2007, the judge denied plaintiffs' motion for summary judgment, granted the union's cross-motion for summary judgment, and dismissed the complaint. App. A at 7a. He held that: (1) CSEA

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[26] Plaintiffs informed the court that they were pleased with the Foundation-sponsored attorneys' conduct of the litigation and did not wish Harren to be their attorney due to his conflicts with their interests. *See* App. C at 46a & App. D at 47a-48a.

[27] The judge also denied plaintiffs' motion for a stay and certification for interlocutory appeal and alternative motion for reconsideration of the denial of counsel's application for appointment as class counsel. App. E at 57a.

may charge objecting nonmembers for organizing expenses; and, (2) CSEA's local unions and units are not required to obtain an independently audited breakdown of their chargeable and nonchargeable expenses. *Id.*

The probation officers timely noticed their appeal with the United States Court of Appeals for the Second Circuit on August 24, 2007. On June 28, 2010, the Second Circuit concluded that, although the union's fee disclosure procedures meet constitutional standards, charging nonmembers for the organizing expenses at issue violates their First Amendment rights. App. A at 1a-28a.

On the critical class counsel issue, the Second Circuit stated:

> Plaintiffs have also appealed the district court's October 24, 2006 order denying their request that their counsel, the National Right to Work Foundation, be appointed as class counsel for a class consisting of all CSEA's dissenting non-members statewide. The district court denied the motion because it held that "Foundation counsel are clearly in conflict with the objectives of plaintiffs and the putative class and cannot act in their best interests [*sic*]." [quoting App. B at 43a]. This conclusion is well grounded in the record. [citing *id.* at 35a-37a]. Accordingly, the district court did not abuse its discretion in declining to appoint the Foundation as class counsel.

App. A at 7a n.3 (majority opinion) (citations omitted).[28]

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[28] Chief Judge Jacobs, concurring, stated: "Insofar as it . . . rules that plaintiffs' counsel should not be appointed as class counsel . . . , I rest upon that opinion entirely." App. A at 23a.

On July 12, 2010, the probation officers timely sought panel rehearing, or, alternatively, rehearing en banc, of the holding that "the district court did not abuse its discretion in declining to appoint the Foundation as class counsel." *Id.* The petition was denied on August 31, 2010. App. G at 61a-62a.

REASONS FOR GRANTING THE WRIT

Considering the ideological views of a sponsoring public-interest legal charity is an extreme example of viewpoint discrimination for which no compelling state interest exists. Those views are neither pertinent nor relevant to the individual attorneys' ability to represent fairly and adequately a class' interests nor are they consistent with Rule 23(g)(1)(B).

The approach followed here rests the fate of those unable to afford legal services on grounds that the government, and the judiciary specifically, are not permitted to tread. The state may not prefer one viewpoint or ideology over another. *Carey v. Brown*, 447 U.S. 455, 466-68 (1980) (government may not favor pro-union speech over other speech). It may not deprive litigants of competent counsel simply because it does not like the funding source or would prefer a funding source more congenial to the views of the litigants' opposing party, as happened here.

The Second Circuit and other lower courts are split on whether a court may deny class counsel appointment or class certification based on the purported ideological goals of a non-profit organization employing the applying lawyers. This Court should grant certiorari to resolve that conflict.

Moreover, the Second Circuit's decision threatens to severely limit civil rights litigants' ability to obtain meaningful access to the courts, appointment of their

attorneys as class counsel, and class-wide relief for violations of constitutional and statutory rights. "[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *see also General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982).

Indeed, "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). This is a particularly dire problem in cases brought for public employees under *Hudson*, because each class member may have only a small amount of money at stake. As this Court noted, it is "tyrannical" to force "an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Hudson*, 475 U.S. at 305. The efficiency of the class action is "a principal purpose of the procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

The label "public interest" reflects the proper role of government. Citizens will obviously disagree on which of diverse organizational viewpoints truly represent the public interest. But, this only serves to bolster the idea that it is only a rainbow of ideas that can truly be called the public interest. When the judiciary dictates who individual litigants and class members may choose to represent them simply because the court disagrees with the color chosen by the supporting organization, it has entered into

territory the First Amendment prohibits. Because this case potentially affects not just plaintiffs and their Foundation-sponsored attorneys, but also the hundreds of ideologically-based public-interest litigating organizations, it presents a question of exceptional importance of constitutional proportions that merits a thorough analysis by this Court.

I. THE CIRCUITS ARE SPLIT CONCERNING CONSIDERATION OF THE IDEOLOGICAL VIEWS OF A SPONSORING PUBLIC-INTEREST LEGAL AID ORGANIZATION IN DETERMINING THE ADEQUACY OF THE "LITIGATION REPRESENTATIVE" FOR CLASS ACTIONS.

The Second Circuit upheld, sub silento, the district court's reliance on *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989),[29] in which the Seventh Circuit opined that the "Foundation is not an adequate litigation representative" for nonmembers "who, while not wanting to pay more (and perhaps even wanting to pay less) than their 'fair share' fees, have no desire to ruin the union or impair its ability to represent them effectively."[30] *Id.* at 1313.

The Fourth and Sixth Circuits have also cited *Gilpin* without any analysis, in affirming the denial of class certification in cases involving Foundation-

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[29] In finding rejection of class counsel "well grounded in the record," App. A at 7a n.3, the Second Circuit cited to that part of the district court's opinion that applied *Gilpin* (App. B at 35a), thus implicitly adopting *Gilpin*.

[30] The persuasive authority of *Gilpin* is weakened by the fact that no Foundation-provided attorneys were involved at the district court level, so the entire opinion is based upon the Seventh Circuit's factual error. *See* note 20, *supra*.

supported attorneys.[31] In contrast, the District of Columbia and Ninth Circuits, and several district courts have rejected *Gilpin's* application to Foundation-assisted class actions, with many of them thoroughly analyzing the issue.[32]

Were the Second and Seventh Circuits' reasoning applied more broadly than just in union fee cases, they could destroy the class action as an effective litigation tool for actions pursued in the public interest. Allowing class counsel analysis to include the ideology of the sponsoring public-interest legal organization would defeat certification of virtually any class

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[31] *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992); *Kidwell v. Transp. Commc's Int'l Union*, 946 F.2d 283, 305-06 (4th Cir. 1991). The district court in *Murray v. AFSCME Local 2620*, 192 F.R.D. 629, 633 (N.D. Cal. 2000), thoroughly distinguishes these cases.

[32] *Cummings v. Connell*, 316 F.3d 886, 895-96 (9th Cir. 2003); *Wagner v. Prof'l Eng'rs*, 3 Fed. Appx. 594, 595 (9th Cir. 2001) (reversing application of *Gilpin*), *on remand*, No. CIV 2-00-1692, 2002 WL 398818 (E.D. Cal. Feb. 22, 2002) (class certified); *Abrams v. Commc'ns Workers*, 59 F.3d 1373, 1378 (D.C. Cir. 1995), *rev'g* No. 87-2816, 1989 WL 200982 (D.D.C. Aug. 15, 1989) (reversing class denial based on *Gilpin*); *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 512-14 (D.N.M. 2004); *Swanson v. University of Haw. Prof'l Assembly*, 212 F.R.D. 575, 577 (D. Haw. 2003); *Lutz v. Machinists*, 196 F.R.D. 447, 453 (E.D. Va. 2000); *Murray*, 192 F.R.D. at 633-36; *Friedman v. Cal. State Employees Ass'n*, No. CIV S000101, 2000 WL 288468, at *5-*6 (E.D. Cal. Mar. 15, 2000); *Baird v. Cal. Faculty Ass'n*, No. CIV.S-00-0999, 2000 WL 1028782, at *6-*7 (E.D. Cal. July 13, 2000); *Leer v. Wash. Educ. Ass'n*, 172 F.R.D. 439, 444-47 (W.D. Wash. 1997). Courts have also certified classes and appointed Foundation staff attorneys as class counsel where defendant unions raised *Gilpin*-type conflict issues, although the court did not cite *Gilpin*. *See, e.g., Bromley v. Mich. Educ. Ass'n*, 178 F.R.D. 148, 162 (E.D. Mich. 1998); *George v. Baltimore City Pub. Sch.*, 117 F.R.D. 368, 370-71 (D. Md. 1987).

when there is judicial hostility to particular claims, classes of litigants, their counsel, or the charitable legal aid organization rendering assistance. *See* W. James Young, *Making Windows Into Litigants' Souls: The Pernicious Potential of Gilpin v. AFSCME*, 5 ENGAGE: J. Federalist Soc'y's Practice Groups 90-99.

Here, as in *Gilpin*, there is no record evidence that any class member disagreed with the remedies the probation officers' attorneys sought. Because there is no such evidence, the Second Circuit and district court could, like *Gilpin*, 875 F.2d at 1313, only speculate that there is a conflict of interest. App. A at 7a n.3; App. B at 38a-39a, 41a, 42a-43a. This Court has rejected the notion that a court's "sheer speculation" is an adequate basis for asserting that relief should be denied. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 46-47 (1990).

The Ninth Circuit, faithful to this Court's pronouncements on the use of speculation, explained why it refused to follow *Gilpin*:

> [D]enial of class certification on the basis of speculative conflicts [is not favored] . . . . The Union produced no evidence that class members actually possess opposing views regarding the pursuit of the punitive remedy. Without some evidence of an actual conflict, the district court did not abuse its discretion by granting class certification.

Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003).[33]

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[33] *See also Wagner*, 3 Fed. Appx. at 595 (reversing class denial based on *Gilpin* when there was no evidence that putative class members disagreed with plaintiffs generally, or with their claim for punitive damages specifically).

Moreover, the speculative conflict theorized in *Gilpin* hinges on the existence of nonmembers who are "free riders." 875 F.2d at 1313. As this Court has stated, a "free rider" is an employee represented by a union who does not pay any dues or fees to the union. [34] Here there are no free riders because union fees are automatically deducted from the nonmembers' pay. [35]As the Ninth Circuit said in a similar case:

> The district court concluded that there was a potential conflict between Plaintiffs and "free riders" in their bargaining unit, but did not make an accompanying finding that there *are* any "free riders." Nor could it have, on this record; the evidence does not establish that the divergence of viewpoint described in *Gilpin* is present in this case. Without some evidence that members of the putative class disagree with Plaintiffs generally, or with their claim for punitive damages specifically, we cannot evaluate the district court's conclusion that Plaintiffs and their counsel are inadequate under *Gilpin*.

Wagner v. Prof'l Eng'rs, 3 Fed. Appx. 594, 595 (9th Cir. 2001) (italics in original).

Even if there were nonunion class members who wanted to pay the least fee while having no "desire to

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[34] "[F]ree riders [are] employees in the bargaining unit on whose behalf the union [is] obliged to perform its statutory functions, but who refus[e] to contribute to the cost thereof." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 872-73 (1998) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984)).

[35] App. A at 3a; N.Y. Civ. Serv. Law § 208(3)(a)-(b); *see also Harrington*, 222 F.R.D. at 512 ("There are no free riders among the [fee-paying] class members, and therefore no conflict of interest within the class or between the class representatives and the absent class members.").

ruin the union or impair its ability to represent them effectively," *Gilpin*, 875 F.2d at 1313, this Court has repeatedly affirmed the rights of both those who object to everything unions do and stand for, as well as those who only object to some union activities.[36] In contrast to *Gilpin* and the lower courts here, the Fifth Circuit and a district court in the Third Circuit have rejected disagreements among class members over the appropriate remedies as a basis for denying class certification.[37]

This specific issue has percolated for more than twenty years. Courts deciding class certification and appointment of class counsel, *see* notes 31 & 32, *supra*, and those that have examined the Foundation as part of the merits of a case, *see* note 6, *supra*, have expressed various and conflicting opinions concerning the Foundation's goals. This conflict demonstrates why Rule 23 cannot allow consideration of the ideological views of a supporting legal organization to determine class counsel's qualifications. A conse-

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[36] "The issue before us is whether [the agency shop] arrangement violates the constitutional rights of government employees [: 1)] who object to public-sector unions as such *or* [2) who object] to *various* union activities financed by the compulsory service fees."*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977) (emphasis added).

[37] *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 485-88 (5th Cir. 1982) (class represented by ACLU attorneys certified for claim that dog-sniffing searches in school were unconstitutional despite assertion by school district that some class members approved of the searches); *Pichler v. UNITE*, 228 F.R.D. 230, 253 (E.D. Pa. 2005), *aff'd on other grounds*, 542 F.3d 380 (3d Cir. 2008) (in action against a union, the "(theoretical) existence of a group of class members that would prefer to sacrifice [their own] interests does not suggest that the named plaintiffs are in any way inadequate representatives").

quence of this hodge-podge of judicial opinions about one organization is that employees needing help to vindicate their constitutional and statutory rights in one circuit have received it and similarly situated employees in another circuit have not. Attorneys employed or engaged by other legal aid organizations may face the same problem. This Court should grant certiorari to resolve the conflict among the circuits on the application of *Gilpin* to the appointment of class counsel provided by public-interest legal organizations.

II. THE SECOND CIRCUIT'S CONSIDERATION OF THE IDEOLOGICAL VIEWS OF A LEGAL AID ORGANIZATION IN APPOINTING CLASS COUNSEL CONFLICTS WITH THE RULE THAT SPECULATION IS IMPERMISSIBLE IN DETERMINING CLASS CERTIFICATION.

A court should not deny a class counsel application based on the purported ideological goals of the public-interest organization that employs the applying lawyers and funds the litigation. That the outcome of a case may have societal ramifications beyond the confines of the case is totally irrelevant in deciding a class or class counsel. In this case, the courts below believed it significant that a named plaintiff or class member might not agree with every ideological position taken by the Foundation over the years. Yet, it is just as likely that a plaintiff or class member represented by an ACLU lawyer will not agree with the ACLU's entire political agenda. If that were a relevant factor, the ACLU, NAACP and countless other organizations on both sides of the ideological

divide would be unable to provide legal assistance in class-action, civil rights litigation.[38]

That the Foundation opposed higher taxes was critical to the lower courts in denying class counsel status to Foundation-sponsored attorneys. App. A at 7a n.3; App. B at 36a-39a, 41a-42a. Without any evidence of the putative class members' views, those courts speculated that the Foundation's opinion on taxes was contrary to the interests of plaintiffs and the class, because they (despite being themselves taxpayers) must favor higher taxes because public employees are paid from tax revenues. App. B at 37a-39a. This, again, contradicts this Court's specific ruling that speculation should be disregarded.[39] *McKesson*, 496 U.S. at 46-47.

What lawyers think about taxes, the war in Afghanistan, healthcare, or any other issue of public debate has absolutely no bearing on their fitness to be class counsel. Clients and lawyers' views on public issues are not matters upon which the district court

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[38] This is precisely why the New York Rules of Professional Conduct specifically allow a lawyer to "serve as a director, officer or member of a not-for-profit legal services organization . . . notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer." Rule 6.3.

[39] The Second Circuit's decision also conflicts with this Court's holding that attorneys funded by public-interest legal organizations are not conflicted if the organizations will only fund specific kinds of cases seeking specific kinds of relief. In *NAACP v. Button*, 371 U.S. 415, 420 (1963), the Court found that the NAACP would not fund lawsuits that did not seek full integration. The Court nevertheless held that there "has been no showing of a serious danger of professionally reprehensible conflicts of interest." *Id.* at 442-43.

is entitled to disqualify (or qualify) class counsel. If the Second Circuit's test of ideological purity stands, the impact on the next class-action case brought by staff lawyers of the ACLU, NAACP, Institute for Justice or any other public-interest legal organization will be devastating.

For example, the ACLU defends anti-Semites' right to promote their message of hate. *See Village of Skokie v. Nat'l Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (ACLU Roger Baldwin Foundation lawyers). Applying the Second Circuit's guilt-by-association theory, ACLU-affiliated lawyers would be disqualified if a putative class in a future case, as is likely, includes individuals who detest anti-Semites or disagree with other ACLU-policy positions.

The lower courts deemed the Foundation "anti-union" and, applying guilt-by-association, its lawyers were also "anti-union" in a way that disqualified them from serving as class counsel for "dissenting nonmembers" of the union.[40] This conflicts with

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[40] The Second Circuit identified the putative class as "all CSEA's *dissenting nonmembers* statewide." App A at 7a n.3 (emphasis added). Dissenting nonmembers of an organization by definition have issues with that organization's objectives. Nevertheless, the district court remained unconvinced of the Foundation-sponsored attorneys undivided loyalty to the plaintiffs and class because "[t]he goals of Foundation counsel conflict with the very foundational objectives *of the CSEA*." App. B at 42a (emphasis added). Even if there were evidence to support that statement, conflict between the nonmembers' attorneys and the foundational objectives of the nonmembers' litigation opponent is not conflict between these attorneys and *dissenting nonmembers of that defendant*. That type of conflict could exist only if the attorneys agreed with the unions' objectives, from which their clients and putative class members had affirmatively dissented. But, according to the judge, only counsel who *agree* with the opposing party's objectives were qualified to

this Court's recognition that "the question what and how much good labor unions do, is one on which intelligent people may differ." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225 n.20 (1977) (quoting *Adair v. United States*, 208 U.S. 161, 191-92, 197 (1908) (Holmes, J., dissenting)). Thus, anyone's views, including attorneys applying for class counsel, on the public issue of the desirability of public-sector labor unions are irrelevant. The only relevant consideration is the attorneys' performance in handling the litigation, and their ability to provide experienced and zealous representation going forward.

The allegations in the complaint and supplemental complaint are that the unions did not provide sufficient financial disclosures to the probation officers and their class, and that CSEA is taking too much money from plaintiffs and other objecting nonmembers in violation of their First Amendment rights. What would present a greater conflict in representing the claims of nonunion employees who thought their wallet and their constitutional rights had been violated by a labor union: lawyers who embraced "the very foundational objectives of the [defendant union]," App. B at 42a, or those who thought that unions were a bad idea for public employees?

In addition to the conflicts already discussed, there is a direct conflict between the Second Circuit and a district court in the Tenth Circuit. The nonunion employees in both cases were represented by Foundation-sponsored attorneys, and the defendant unions

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represent nonmembers of CSEA in a class action. That would mean that both class counsel and CSEA's own counsel would embrace CSEA's "foundational objectives," a result inconsistent with the adversarial nature of litigation.

were represented by the same law firm as here, Bredhoff & Kaiser. *Harrington*, 222 F.R.D. at 507. The *Harrington* court faced the same factual record and arguments as the Second Circuit and district court did here.[41] However, unlike the Second Circuit and district court, the *Harrington* court rejected the unions' arguments as irrelevant and baseless, and appointed Foundation-sponsored attorneys as class counsel pursuant to Rule 23(g):

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[41] The *Harrington* court made these findings.

> Defendants contend that Plaintiffs' counsel are conducting this litigation to effectuate the goals of the Foundation, not those of the class, and that it is the intent and motive of the Plaintiffs' counsel to destroy the union entirely. The Defendants direct the Court's attention to fund-raising literature from the Foundation and other material, which they argue shows that the Foundation uses class-action suits as a vehicle for weakening organized labor and advancing the right to work cause.
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> Finally, the Defendants allege that the Plaintiffs' counsel is conducting this litigation in part to 'strike a blow for taxpayers everywhere' as was written in a Foundation fund-raising letter. They argue that the Plaintiffs are therefore not representing the interests of the absent class members, who they again presume would not intentionally weaken their own collective bargaining representative by suing the union, particularly for punitive damages. . . . To reiterate, the Defendants have not identified any members of the Plaintiff class who are opposed to the lawsuit or to seeking punitive damages, or who actually desire not to weaken the union.
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> . . .
>
> The Defendants' arguments are based entirely on speculation; there is no evidence in the record to support them.

222 F.R.D. at 519-21; *accord, id.* at 513-14.

> [A]ll the Defendants have really shown is that Plaintiffs' counsel want to win this lawsuit.
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> . . . The Defendants do not allege that Plaintiffs' counsel has acted unethically or otherwise inappropriately . . . . The Plaintiffs' attorneys' desire to win this lawsuit, *whatever their motives for doing so*, only ensures that it will be vigorously litigated, as it has been to this point.

Id. at 519 (emphasis added).

Harrington also rejected the taxpayer "conflict" argument embraced by the Second Circuit:

> [E]ven if the Defendants' [taxpayer] argument is true, it does not necessarily present a conflict of interest with the class members. After all, the class members are taxpayers; they are not union members. The Defendants have not established that the Plaintiffs' attorneys have an impermissible conflict of interest. The Court finds that the Plaintiffs' counsel will fairly and adequately represent the interests of the class.

Id. at 520.[42]

The Harrington court, 222 F.R.D. at 520, also found noteworthy that the Foundation "has played a significant role in shaping the law applicable to this case, and the Plaintiffs' attorneys have ample knowledge of it to represent the class in this case." The court noted, too, that the Foundation, which funded *Harrington* and is funding this litigation, "has resources most

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[42] *See also* App. A at 27a (Jacobs, C.J., concurring) ("Government employees are also citizens, ratepayers, property owners, and members of families . . ."); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) ("worker and union cannot be said to speak with one voice")

other attorneys would be unable to muster in representing the class." *Id.* at 521.

This Court should grant certiorari to resolve the split in the lower courts and correct the Second Circuit's flawed interpretation of Rule 23(g)(1)(B) that the ideological views of a legal aid organization can be considered in deciding whether to appoint class counsel provided by such an organization.

III. THE DECISION BELOW DISQUALIFYING FOUNDATION-PROVIDED COUNSEL CONFLICTS WITH OTHER CLASS OPINIONS CONSTRUING THE FIRST AMENDMENT.

This case was brought to vindicate fundamental constitutional rights. The Second Circuit agreed: "We first consider whether charging non-member employees for organizing activities under the circumstances presented here is consistent with the First Amendment." App. A at 8a. "We hold that under the First Amendment, plaintiffs . . . cannot be charged for the organizing expenses" at issue in this case. *Id.* at 3a.

The probation officers not only raised First Amendment rights in their litigation, they have First Amendment rights to choose the process by which they will vindicate those rights.[43] Plaintiffs chose to

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[43] *See Hudson* (First Amendment right to proper procedures in union fee challenge); *Button*, 371 U.S at 428-29 ("We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments . . . "); *Brotherhood of R.R. Trainmen v. Va.*, 377 U.S. 1, 5-6, 7 (1964) (union members have the constitutional right to "gather to-

associate themselves with lawyers whose work is funded by the Foundation and to bring their case as a class action.[44]

> [T]he exercise . . . of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious . . . . [T]he Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

NAACP v. Button, 371 U.S. 415, 439-40, 444-45 (1963).

The Second Circuit's decision conflicts with the Ninth Circuit's decision in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982). There, the Ninth Circuit held it a violation of the First Amendment right of free association to deny class certification to employees representing a class of union pension fund participants

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gether for the lawful purpose of helping and advising one another," and to refer injured members to "particular lawyers").

[44] Contrary to the lower courts, at no time did the probation officers ever suggest that the Foundation was "their counsel" or should serve as class counsel. In fact, the Foundation is neither a lawyer nor a law firm Erroneously treating the "Foundation's application" for class counsel as one of "well grounded" fact, App. A at 7a n.3, (when in fact it had no factual grounding whatsoever), the Second Circuit dispatched the First Amendment rights of the plaintiffs, the class and plaintiffs' counsel. Although plaintiffs raised their First Amendment claim in both the district court and the Second Circuit, neither court discussed it except in the district court's denial of reconsideration, and then only in the context of the temporary disqualification of plaintiffs' counsel. App. E at 55a-56a.

because the employer encouraged the employees to file suit.

Specifically, the pension fund and its trustees claimed that the employer solicited the employees' lawsuit. They urged reversal of class certification on public policy grounds. The Ninth Circuit refused because "decertification here would impair the associational rights of employers and employees, *see In re Primus*, 436 U.S. [412,] 426 [(1978)], and meaningful access to the courts. *See United Transp. Union v. State Bar*, 401 U.S. 576 (1971)." *Fentron*, 674 F.2d at 1305.

The associational and expressive rights of the employees and their counsel who choose to associate with the Foundation to vindicate the employees' rights are constitutionally protected. It is the employees' decision, with which the state cannot interfere, as to which legal aid organization and counsel they choose to associate to best vindicate their rights. Litigation in the service of an ideological cause is a "mode[] of expression and association protected by the First and Fourteenth Amendments." *Button*, 371 U.S. at 428-29. Indeed, for some groups, "association for litigation may be the most effective form of political association." *Id.* at 431.

It is natural that dissenting nonunion employees would choose an allegedly "anti-union" legal aid organization when suing a union. Certainly, to choose a legal aid organization that shared the "the very foundational objectives," App. B at 42a, of their litigation opponent would be illogical! Yet, the Second Circuit permitted the district court to appoint an attorney as class counsel who agreed with the "very foundational objectives" of the opposing party.

This result, so adamantly contrary to the adjudicatory system, is possible only if nothing prevents a judge from considering the views of the funding organization. Just as judges are in no position to adjudicate the relative merits of an individual's religious beliefs, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (public officials are prohibited from prescribing what opinions are orthodox), so they are incompetent to judge the relative merits of an individual's (or supporting legal organization's) ideological beliefs. If the First Amendment means anything, it means that this is wholly off-limits.

"The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Therefore, it is a First Amendment violation to deny class-counsel status on the basis of the counsel or the supporting public-interest legal organization's viewpoint on matters of public interest.

If certiorari is not granted, the decision of the Second Circuit (and Seventh Circuit in *Gilpin*) seriously threatens the programs of all members of the legal aid community that support litigation as an exercise of First Amendment rights.[45] Here, the

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[45] These decisions have planted seeds of destruction for the cause-promoting, legal-aid community's use of the class-action device. They have created a "guilt-by-association" test to be applied to proposed class counsel, and they have opened up a wealth of discovery opportunities for defense counsel to probe into the ideological beliefs and associations of individuals who must rely on legal aid to vindicate their constitutional and statutory rights. In fact, civil rights defendants will now use the

utilization of the Foundation's ideological views to deny Foundation-sponsored attorneys' appointment as class counsel unjustly damages the employees' rights to exercise their constitutional right to limit governmentally-coerced association with unions.

Whether intended or not, the circuits' scrutiny of the Foundation's ideological views is reminiscent of what the Commonwealth of Virginia and others did in regard to the NAACP in the 1950s and 1960s:

> We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought.
>
> . . . Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular.

Button, 371 U.S. at 435, 443 (footnotes omitted).

The Federal Rules of Civil Procedure, like any legislation or governmental regulation, must be construed consistently with the First Amendment. This Court did not countenance utilization of state bar rules to prevent legal aid organizations from vindicating constitutional rights for large classes of

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lower courts' decisions here to pursue the "divide and conquer" approach. They will attempt to probe civil rights litigants' ideological beliefs, the organizations supporting them, as well as potential class members, in an effort to show a variety of beliefs and deny appointment of class counsel supported by civil rights litigants. Courts will then face the job of sorting out which ideologies are compatible, which are worthy of protection, and which are of so little importance as to allow the matter to proceed despite the alleged conflict

individuals, however controversial they might be.[46] It also should not countenance use of the Federal Rules to that same end.

This Court should grant certiorari to determine the constitutionality of a district court's consideration of the ideology of public-interest legal organizations in deciding whether to appoint as class counsel attorneys provided by such organizations.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant their petition, issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and set the case for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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[46] *In re Primus*, 436 U.S. 412 (1978); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U S. 217 (1967).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

Docket No. 07-3683-cv

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, LAURA J. SWARTZENBERG, on behalf of themselves and the class they seek to represent,

Plaintiff

-v.-

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; THE CIVIL SERVICE EMPLOYEES ASSOCIATION; AFSCME, LOCAL 1000; AFL-CIO; AND AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendants-Appellees.

(Argued: December 3, 2008
Decided: June 28, 2010)

Before: JACOBS, MCLAUGHLIN, B.D. PARKER, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Western District of New York (Telesca, *J.*), dismissing claims brought by public-sector employees who, as nonmembers of the union that represents them for collective-bargaining purposes, challenge organizing fees assessed by the union. We conclude that although the union's fee

disclosure procedures meet constitutional standards, charging these nonmembers for the organizing expenses at issue violates their First Amendment rights. AFFIRMED IN PART, REVERSED IN PART. Chief Judge Jacobs concurs in the judgment and in the opinion of the Court and files a separate concurring opinion.

JOHN R. MARTIN, Milton L. Chappell, National Right to Work Legal Defense Foundation, Inc., Springfield, VA; Laurence B. Oppenheimer, Hiscock & Barclay, LLP, Buffalo, NY, *for Plaintiffs-Appellants.*

JOHN M. WEST, Matthew Clash-Drexler, Bredhoff & Kaiser, P.L.L.C., Washington, D.C.; Jules L. Smith, Blitman & King LLP, Rochester, NY, *for Defendants-Appellees.*

BARRINGTON D. PARKER, *Circuit Judge.*

Plaintiffs-Appellants David Scheffer, Mary Bergevin, Joseph Stephany, and Laura Swartzenberg are probation officers employed by Monroe County, New York. They work within a collective-bargaining unit represented by the Civil Service Employees Association, Inc. ("CSEA" or "the union"), Local 1000, AFSCME, AFL-CIO. Although they are not union members, they are nonetheless required by New York law to pay a fee to the union for certain union activities that benefit them. The primary issues on this appeal are whether the First Amendment permits charging them their proportionate share of the costs associated with some of the union's organizing activities, and whether CSEA's disclosure of how its expenses are allocated is constitutionally adequate.

The United States District Court for the Western District of New York (Telesca, *J*) granted summary

judgment to CSEA. *Scheffer v. Civil Serv. Employees Assn, Local 828*, No. 05-cv-6700, 2007 WL 2126286 (W.D.N.Y. July 25, 2007). The court concluded that the organizing activities in question were necessary to preserve and enhance the wages and benefits of existing union-represented employees, and were therefore sufficiently related to collective bargaining to allow the union to charge nonmember employees for them. The district court also concluded that the union's method of calculating and reporting the expenses of local affiliates met constitutional standards. We agree with the district court that the fee calculation and disclosure procedures are constitutional, but we hold that under the First Amendment, plaintiffs-appellants cannot be charged for the organizing expenses involving employees who perform entirely different types of work.

BACKGROUND

CSEA negotiates with approximately 900 employers across New York State on behalf of over 200,000 employees, mostly state and local government employees. The Monroe County unit is a subdivision of Local 828, which is one of roughly 375 CSEA "locals" in the state. New York has recognized CSEA as the exclusive bargaining representative for employees within the Monroe unit, which includes the appellants. *Id.* at *1 -*2.

Under New York law, when a public employer has certified an exclusive bargaining representative to negotiate on behalf of employees, those employees pay dues to the union through automatic deductions from their paychecks. N.Y. Civ. Serv. Law § 208(1). Employees are not required to join the union. However, under both federal law and New York, a union certified as an exclusive bargaining agent is

required to fairly represent all employees in the bargaining unit whether or not they are dues-paying members. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977); *Civil Serv. Bar Ass'n v. City of N.Y.*, 474 N.E.2d 587, 590-91 (N.Y. 1984). In light of this responsibility, New York (like many other states) allows public sector unions to collect by automatic deductions an "agency shop fee" in lieu of dues. The New York statute also provides, however, that the union must "refund to any employee demanding the return any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment." N.Y. Civ. Serv. Law § 208(3)(a).[1] Meanwhile, federal constitutional law requires a set of prophylactic procedures that unions must follow in collecting the fee, which include the requirement that nonmembers be given notice of the basis for the union's calculation of which expenditures are "chargeable" and "nonchargeable" to objectors, along with the opportunity to register an objection to paying the chargeable portion of the fee. *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 306-07 (1986).

In June 2005, appellants resigned their union membership and objected to paying for various union activities. In so doing, they became part of the roughly nine percent of CSEA employees (approximately 18,700 employees statewide) who are not members of the union but who nonetheless are obligated to pay agency shop fees. The union thereaf-

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[1] This structure mirrors arrangements permitted by federal law and upheld by the Supreme Court. *See, e.g., Abood*, 431 U.S. at 224.

ter sent them annual Agency Shop Notices outlining the union's chargeable and nonchargeable expenses, and quarterly advance rebate checks for the nonchargeable portions of the shop fees.

The notices for 2005-06 and 2006-07 calculated CSEA's chargeable expenses as 78% and 74%, respectively, of full union dues. The notices also indicated that 95% of "organizing" costs were chargeable. The notices described two forms of organizing: (1) organizing within the bargaining unit (e.g., mailing membership brochures to unit members), and (2) organizing non-union workers. As to the second category,[2] CSEA's organizing efforts focus on organizing low-wage private-sector employees who perform work similar to that performed by CSEA-represented employees in the developmental disability, food service, and courier industries. CSEA considers these organizing efforts essential to deterring public-sector employers from privatizing or contracting out jobs traditionally held by bargaining-unit members, and to prevent the existence of nonunion competition from depressing wages.

The notices also included an audit of CSEA's percentage allocation between chargeable and nonchargeable expenses. The audit notices reveal that approximately 16% of CSEA's annual budget is spent through distribution of funds to locals and regions, and that CSEA applied to that 16% the same percentage rate of chargeable versus nonchargeable expenses applicable to CSEA's other expenses. CSEA defends this allocation on the basis of a presumption

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[2] Only the second group of organizing costs appears to have been litigated below, and so we consider only the chargeability of those costs.

that the local affiliates' percentage of chargeable expenses cannot have been lower than the central union's because a high percentage of local affiliates' expenses is chargeable as compared with the expenses of statewide affiliates.

The appellants sued in district court challenging these arrangements and making two principal arguments: (1) compelling them to pay fees to support organizing activities impermissibly burdened their First Amendment rights; and (2) CSEA's use of the local union presumption (in lieu of independently audited spending reports for each local CSEA affiliate) constituted constitutionally inadequate disclosure.

Appellants offered three major contentions why, under the First Amendment, all organizing costs are categorically nonchargeable to nonmember employees. They first claimed that, like political contributions that strengthen a public-sector union, organizing is too removed from a union's core collective bargaining activities to be considered a part of that function. Secondly, they contended that the connection between organizing and collective bargaining is too tenuous to support the inference that one who does not pay for organizing is a free-rider on the union's efforts to administer the collective agreement. Finally, they contended that because organizing is, at its core, the advocacy of the fundamental ideological commitment to unionism—i.e., because organizing is the marketing of the union—charging nonmembers for organizing expenses is an unwarranted burden on First Amendment freedoms. CSEA, in response, took the position that its organizing efforts were merely a natural outgrowth of its chargeable collective bargaining work because it

targeted employees whom it needed to unionize in order to deter public-sector employers from privatizing jobs held by bargaining-unit members and from decreasing CSEA-represented employees' wages.

Both parties moved for summary judgment. Applying the test set forth in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), the district court concluded that the union's organizing activities did not violate the First Amendment because those organizing activities were "germane to protecting, through collective bargaining, the wages, benefits and working conditions of bargaining unit members." *Scheffer*, No. 05-cv-6700, 2007 WL 2126286, at *13. The court also held that use of the local union presumption met First Amendment standards. It reasoned that absolute precision in calculating nonmember fees was not required; that the presumption employed by CSEA appeared, if anything, to undercharge nonmember employees; and that CSEA had adequate safeguards to ensure that local affiliates' percentages of nonchargeable expenses did not exceed those of statewide affiliates. *Id.* at *15. The district court thus granted summary judgment for CSEA. This appeal followed.[3]

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[3] Plaintiffs have also appealed the district court's October 24, 2006 order denying their request that their counsel, the National Right to Work Foundation, be appointed as class counsel for a class consisting of all CSEA's dissenting nonmembers statewide. The district court denied the motion because it held that "Foundation counsel are clearly in conflict with the objectives of plaintiffs and the putative class and cannot act in their best interests." *Scheffer v Civil Serv. Employees Ass'n*, Local 828, No. 05-cv-6700, Slip. Op. at 15 (W.D.N.Y. Oct. 24, 2006). This conclusion is well grounded in the record. *See id.* at 7-9. Accordingly, the district court did not abuse its discretion in declining to appoint the Foundation as class counsel. *See*

DISCUSSION

We review a grant of summary judgment *de novo* and construe the evidence in the light most favorable to the nonmoving party. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999). We will affirm if the record indicates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Based on the substantial record before us, we find no issues of material fact that require further development, and conclude that (1) plaintiffs-appellants are entitled to summary judgment with respect to their claim that they cannot be charged for the union's costs of organizing private-sector workers in the developmental disability, food service, and courier industries, and (2) the union is entitled to summary judgment on plaintiffs' claim that the fee-disclosure procedures are unconstitutional.

I.

We first consider whether charging nonmember employees for organizing activities under the circumstances presented here is consistent with the First Amendment. The Supreme Court, in *Abood*, held that although agency shops in the public-employment context implicate employees' First Amendment interests in freedom of speech and association, such unions are "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. The central service a union performs for nonmember

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Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003) ("Generally, a district court's decision regarding class certification is reviewed for abuse of discretion.").

employees is to collectively bargain on their behalf. Therefore states may, consistent with the First Amendment, "require [an employee] to help finance the union as a collective-bargaining agent," even if the employee harbors "political objections to unionism itself" *Id.* Otherwise, nonmember employees would be "free-riders" on the union's collective bargaining activities on their behalf. *Lehnert*, 500 U.S. at 520-21.

That an expense is related to collective bargaining is a necessary, but not sufficient, condition for its being chargeable to a dissenting nonmember under the First Amendment. There is a thin line between those limits to a nonmember's speech and association rights that can be justified by the government's legitimate interest in the agency shop, and those that cannot. In *Lehnert*, the Supreme Court set forth a three-part test for evaluating whether union expenses are constitutionally chargeable to dissenting nonmembers of a public-sector union. According to the Court, "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. In order to satisfy *Lehnert*, all three elements of the test must be established. In this case, we hold that although the organizing at issue is germane to collective bargaining, it does not present a free rider problem, and thus is not chargeable under *Lehnert*. We therefore need not consider the issue of whether the organizing activity

here significantly adds to the burdening of free speech inherent in the agency shop.[4]

The district court concluded, as do we, that absent organizing, CSEA would be deprived of an important lever in negotiating on behalf of the employees it already represents, and that organizing within a competitive market is therefore "germane to protecting, through collective bargaining, the wages, benefits, and working conditions of bargaining unit members." *Scheffer*, 2007 WL 2126286, at *13. The record

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[4] As Judge Jacobs explains in his concurrence, he would prefer to decide the case on the alternative ground that when a public-sector union organizes private-sector workers, it categorically imposes an impermissible burden on the free expression of dissenting nonmembers, even if those nonmembers could appropriately be considered "free-riders" on the union's organizing efforts. He would so hold based on his conclusion that such organizing underwrites, in the public sphere, the ideology "that government employment should be augmented and that privatization should be frustrated and prevented." *See* Concurring Op. at 5.

Judge Parker and Judge McLaughlin, on the other hand, believe that such organizing may, in certain circumstances, simply express a commitment to, and embody a strategy for, collective bargaining on behalf of employees, not a commitment to a broader ideological viewpoint about privatization. Thus, in their view, organizing of this nature can be consistent with the First Amendment, as the Supreme Court has made it clear that when a union is acting "to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood*, 431 U.S. at 222-23 (internal quotation marks omitted).

Regardless, we need not resolve these differences. The *Lehnert* analysis is highly fact-specific and is applied on a "case-by-case" basis. *Lehnert*, 500 U.S. at 519. Because we find, on the record before us, that there is no free-rider problem, we end our analysis there.

below establishes that CSEA bargaining-unit members in the developmental disability, food service, and courier industries have faced increased threats to their job security, wages, and benefits in recent years due to employers' efforts to contract out their work to non-union, private-sector employees in the same industries, and also that the increasing presence of non unionized employees has impaired CSEA's ability to achieve wage and benefit gains for bargaining-unit members who work in these industries. Facts undisputed by the parties indicate that public-sector employers in New York have attempted to shift jobs held by CSEA employees in the developmental disability, food service, and courier fields to nonunion employees. For example, private-sector employees in the developmental disability field receive an average of $15,000 less in wages and benefits annually than CSEA labor, and the State has therefore directed growth in that industry towards less expensive nonunion labor. Out of 5,000 beds for people with developmental disabilities funded by New York State through the New York Cares program in the last five years, private-sector nonunion employees were responsible for 4,900 of them. The state has also threatened to transfer responsibility for facilities operated by union labor to lower cost private-sector employers, resulting in the loss of those union jobs. Unionized employees in food and courier services in schools have also been threatened because school districts have attempted to replace full-time positions with part-time, nonunionized, lower-wage labor.

CSEA believes that after it initially failed to respond to threats of this nature, its collective bargaining efforts on behalf of the employees it represents significantly suffered. CSEA noted that during collective bargaining negotiations, employers

made comparisons between the wages of unionized labor and nonunion labor in order to pressure CSEA to make concessions for lower wages. CSEA has established that the increased presence of private-sector nonunion labor poses a serious threat to its employees' job security, wages, and benefits. These are areas which are at the core of CSEA's collective-bargaining responsibilities, and which CSEA is statutorily required to advocate for on behalf of both members and nonmembers.

CSEA's organizing activities differ from those the Supreme Court found non-chargeable in *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). In *Ellis*, which was decided prior to the Court's formulation of the *Lehnert* test, the Court considered whether general organizing expenses were chargeable under the Railway Labor Act (RLA), 45 U.S.C. § 152. Conducting an analysis akin to germaneness, *Ellis* concluded that "dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer." 466 U.S. at 452. In *Ellis*, however, there was no specific evidence that the organizing at issue afforded anything more than an attenuated benefit to its members. In contrast, because the non-unionized employees that CSEA is organizing are "pa[id] lower wages and provide[d] lesser benefits" than current CSEA employees, CSEA's "prospects of achieving the economic objectives of the members of the bargaining unit" are significantly weakened. *United Food & Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760, 769 (9th Cir. 2002) (en banc) ("*UFCW*"), *cert. denied*, 537 U.S. 1024 (2002) (upholding an NLRB opinion that the cost of organizing a competing employer's workers was germane

to collective bargaining). Therefore, CSEA's organizing activities "may be crucial to improving the wages, benefits, and working conditions of employees in the bargaining unit" by reducing "the competition of employers and employees based on labor conditions regarded as substandard." *Id.* at 768-69 (internal quotation marks omitted).[5] Under *Ellis*, chargeable activities include "not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." 466 U.S. at 448 (holding that union conventions, social activities, and publications were chargeable so

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[5] In *UFCW*, the Ninth Circuit recognized two other factors that further distinguish *Ellis*: (1) the *Ellis* Court's interpretation of the RLA, a federal statute, relied heavily on legislative history, and (2) the RLA was designed to regulate the railroad industry, which, at the time the RLA was enacted, was highly organized and national in scope. 307 F 3d at 770. CSEA, in contrast, is operating as an agency shop under a generally applicable state law, and is conducting its chargeable organizing activities because the lack of organized workers in the low-wage workforce is proving a serious impediment to collective bargaining. *Ellis*'s holding that "organizational efforts were not what Congress aimed to enhance by authorizing the union shop," 466 U.S. at 452, is therefore inapposite. It is also worth noting that some of the challenged charges in *Ellis* related to organizing that extended outside competitive markets to reach employees in entirely different industries. *See UFCW*, 307 F.3d at 770 (citing *Ellis v. Bhd of Ry. Clerks*, 685 F.2d 1065, 1075 (9th Cir. 1982) (Whelan, J., dissenting)). Although appellants are probation officers as opposed to employees in the developmental disability, food services, and courier fields that CSEA is attempting to organize, they are part of a union that includes such workers.

long as they did not relate to political causes). The organizing activities considered in *Ellis* did not rise to that level. Those at issue here, in contrast, do, and therefore they satisfy *Lehnert*'s germaneness prong.

However, the fact that this organizing is germane to CSEA's collective bargaining activities does not resolve the issue of whether *these particular plaintiffs* can properly be charged for it. It is clear to us that as probation officers, they derive little meaningful benefit from the unionization of workers in the developmental disability, food service, and courier industries, and therefore present no free-rider problem by not paying the costs of this organizing.

CSEA's expert witness, labor economist Dr. Dale A. Selman, testified in support of the theory that "higher union density in the public sector contributes to union bargaining power—the ability of a union to negotiate better wages and benefits for those the union represents." Decl. of Dr. Dale Belman at 9 ("Belman Decl."). As Dr. Belman explained, "[t]he organization of private-sector individuals *who do similar work* as public employees is critical to protecting the earnings (and jobs) of public-sector union members insofar as it serves to eliminate the incentive to privatize union work." *Id.* at 12 (emphasis added). In other words, the union density theory is based on the idea that organizing private-sector workers who compete with public-sector workers will benefit those public-sector workers. This theory depends upon a considerable overlap between the job of the dissenting nonmember and the job of the private-sector worker being organized. Accordingly, Benjamin Gordon, CSEA's Director of Organizing, testified in his declaration that organizing private-sector employees in the developmental disability, food

service, and courier industries enhances CSEA's bargaining power and thereby benefits CSEA employees who work, respectively, in the developmental disability, food service, and courier industries. *See* Decl. of Benjamin I. Gordon ¶¶ 8-29 ("Gordon Decl.").

The union density theory fails to explain how organizing private-sector workers benefits union-represented public-sector employees who do not compete for jobs with the workers being organized. Here, the union has presented no evidence that probation officers compete for jobs with workers in the developmental disability, food service, and courier industries. Indeed, it is self-evident that probation officers do not do the same work as those who work in the developmental disability, food service, or courier industries. Nor do probation officers compete with people who do those jobs, except to the extent that everybody competes with everybody. Among these four occupations there are marked differences in every consideration that matters for employment: responsibility, education, physical capacity, language skill, training, licensure, hours, wages, work schedules, etc. There is no obvious cross-elasticity of demand between probation officers on the one hand and developmental disability, food service, or courier employees on the other. Therefore, plaintiffs-appellants derive little benefit from the organizing at issue in this case, and there is no free-rider problem to justify charging them for it.[6]

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[6] Appellants did not raise this particular free-rider argument—that CSEA's efforts to organize private-sector competition in industries other than plaintiffs' provides no benefit to plaintiffs' own bargaining unit—with the same precision that they did both below and in their reply brief. We are therefore not

Addressing this argument in the district court, the union emphasized that, under *Lehnert*, "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit" as long as there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524; *see* Def. Reply Br. in Support of Mot. for Summ. J., D. Ct. Doc. No. 58 (filed March 23, 2007), at 8-9. However, there is no indication that plaintiffs' payment for CSEA's organizing of private-sector workers will significantly benefit plaintiffs in the future. For example, the union presented no evidence that it plans to "pool" its organizing expenses in a way that will ultimately inure to the benefit of probation officers. *See Lehnert*, 500 U.S. at 523. Nor is there any evidence that the union eventually plans to organize private-sector workers who compete with the appellants. The closest such evidence in the record is the deposition testimony by plaintiff Joseph Stephany that he has heard "rumors" that Monroe County is considering privatizing some probation department jobs. App'x 1037. There is no evidence, however, that this privatization is imminent or even likely, or that CSEA would attempt to organize private probation

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required to consider this argument. *Thomas v. Roach*, 165 F.3d 137, 145-46 (2d Cir. 1999). Nevertheless, we do so here because the union bears the burden of proving that its expenses are chargeable under *Lehnert*, *Seidemann v. Bowen*, 584 F.3d 104, 111 (2d Cir. 2009), and because the union had an opportunity to litigate the issue below.

officers should they ever exist. Unlike more traditional collective bargaining activities (e.g., contract negotiation), the benefit of which appellants' bargaining unit is likely to receive at some point in the future even if not "in any particular membership year," *Lehnert*, 500 U.S. at 523, CSEA's organization of private-sector workers who compete with appellants is a hypothetical possibility contingent on a series of future events whose likelihood of occurrence has not been demonstrated. Accordingly, plaintiffs-appellants are entitled to summary judgment on their claim that charging them for CSEA's private-sector organizing violates their rights under the First Amendment.

II.

The plaintiffs additionally argue that the local union presumption CSEA applies to categorize the 16.6% of its budget that is spent by local unions does not satisfy the standard articulated in *Chicago Teachers Union, Local No. 1 v. Mason*, 475 U.S. 292 (1986). In *Hudson*, the Supreme Court addressed the constitutionality of procedures by which unions identify chargeable costs and report such costs to nonmember employees. The court cautioned that "[c]arefully tailored" procedures are necessary to (1) minimize constitutional infringement and (2) give a nonmember employee "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." *Hudson*, 475 U.S. at 303. The *Hudson* Court emphasized that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*." *Id.* at 306.

To protect against this danger, a union must provide "adequate disclosure" of the "major categories of expenses," verified by an "independent auditor." *Id.* at 307 n.18. "[A]bsolute precision" cannot be expected or required of the disclosures, and as long as the major categories of expenses are included, "an exhaustive and detailed list" of all expenses is not necessary. *Id.* (internal quotation marks omitted). Payments to affiliated organizations must include a showing that the payment is entirely chargeable or must include "an explanation of the share that [i]s [nonchargeable]." *Id.* *Hudson* also requires the union to provide for a reasonably prompt decision by an impartial decisionmaker in the event of an objection to the calculations in an Agency Shop Notice. *Id.* at 307.

In its annual Agency Shop Notice to nonmembers, CSEA reports the expenditures of its over 1400 regional, local, and unit affiliates as matching that of the statewide union, and thereby effectively, "presumes" that the local unions' nonchargeable costs will not exceed those of the statewide union. According to the union, that presumption is based upon the fact that CSEA local unions perform tasks that are overwhelmingly chargeable relative to the statewide union. Local unions, for example, tend to handle grievances, disciplinary matters, labor-management relations, safety and health monitoring, and the like, so the local presumption likely understates the actual chargeable percentage of local expenditures.[7]

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[7] As CSEA notes, if a higher portion of local affiliates' expenses are chargeable relative to those of statewide affiliates, the local union presumption results in a lower charge to

The union has pointed to internal procedures designed to ensure that the nonchargeable expenses oflocal affiliates do not exceed those of CSEA as a whole. The local affiliates' expenditures are limited by (1) the CSEA constitution, which prohibits local expenditures on political or ideological activities; (2) a CSEA Financial Standards Code foreclosing local expenses on political causes; (3) annual notices of CSEA's statewide expenses and instructions to local affiliates that the nonchargeable percentage of local expenditures is not to exceed that of the statewide union; (4) the requirement to demonstrate compliance with that instruction through budget and expenditure reporting prior to the receipt of funds from the statewide union; and (5) CSEA audits on a random basis of local compliance with the nonchargeable percentage limitation.

Appellants assert, however, that the expenditures of each local must be independently audited in order to provide nonmember employees with sufficient information to gauge the propriety of the union's fee. They also contend that CSEA's assumption that the local affiliates abide by CSEA's internal spending restrictions is the "functional equivalent of the fox guarding the henhouse." According to appellants, there is no reason to expect the local unions' expenses to match those of CSEA as a whole, as the locals have their own budgets, presidents, and treasurers.

The district court held that use of a local union presumption is constitutionally permissible. Noting that the presumption results in a smaller fee assessment against nonmembers than would otherwise

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nonmembers than they would receive in the absence of the presumption.

exist, and also that CSEA has taken steps to ensure that the percentage of nonchargeable expenses of local affiliates does not exceed that of statewide and regional offices, the district court concluded that the application of the presumption is reasonable. The district court also noted that our decision in *Price v. UAW*, Local 571, 927 F.2d 88, 93 (2d Cir. 1991), which holds that the local union presumption satisfies the "duty of fair representation" standard under the National Labor Relations Act ("NLRA"), strongly supports a conclusion that the presumption is also appropriate under the First Amendment.

We agree with the district court's assessment. In *Price*, we determined that the local union presumption meets the NLRA's "duty of fair representation," but we also relied upon *Andrews v. Education Ass'n*, 653 F. Supp. 1373 (D. Conn.) (Cabranes, J.), *aff'd on other grounds*, 829 F.2d 335 (2d Cir. 1987). In *Andrews*, Judge Cabranes held that the local union presumption is constitutional because *Hudson* does not require absolute precision in the calculation of charges to nonmembers. *Price*, 927 F.2d at 94; *see also Andrews*, 653 F. Supp. at 1377-78.

We now hold that the local union presumption is permissible under *Hudson*. Unlike *Hudson*, where the Union had done nothing more than disclose, without further explanation, that nonmembers were responsible for 95% of the Union's total expenditures, CSEA has followed *Hudson*'s instructions that it disclose "the major categories of expenses" (of which the expenses of its locals are one) and that it employ "an

independent auditor." *Hudson*, 475 U.S. at 307 & n. 18. Further precision is not required by *Hudson*.[8]

"The test of adequacy of the initial explanation to be provided by the union is not whether the information supplied is sufficient to enable the employee to determine in any final sense whether the union's proposed fee is a correct one, but only whether the information is sufficient to enable the employee to decide whether to object." *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991); *see also Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003) (purpose of *Hudson* notice is to provide nonmember with information necessary to evaluate whether to object to union's calculation of chargeable expenses). Here, therefore, as was the case in *Price*, "any objector need not accept the Union's use of the 'local presumption' but may challenge it in arbitration. In the event of such a challenge the Union bears the burden of proving that the local union's expenditures are chargeable to the degree asserted by the Union." *Price*, 927 F.3d at 94.

We are satisfied that application of the local union presumption provides the information necessary to allow nonmembers to gauge the propriety of the fee and whether or not they should object to it, which is the purpose of the notice. As previously noted, the

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[8] *Hudson* does require that local unions provide an explanation of how the share of their payments to "affiliated state and national labor organizations" were used. 475 U.S. at 307 n.18 Payments to affiliated state and national labor organizations, however, pose a particular danger of being used for nonchargeable purposes due to the political nature of those organizations In contrast, and as CSEA has explained, its local divisions are more administrative in nature, and in fact are required to spend less on nonchargeable activity than CSEA as a whole does.

union has set in place a variety of internal procedures, including provisions in its constitution, its Financial Standards Code notices, and audits, designed to ensure that the chargeable expenses of local affiliates do not dip below that of CSEA as a whole. We conclude that this constellation of procedures meets constitutional standards.

CONCLUSION

The judgement of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

DENNIS JACOBS, Chief Judge, concurring:

I concur in the Court's opinion. Insofar as it holds that the fee disclosure was adequate (and rules that plaintiffs' counsel should not be appointed as class counsel), I rest upon that opinion entirely. As to the assessment of non-members for union organizing expenses, I concur—with these further observations.

A

As the Court's opinion explains, expenses are chargeable only if they pay for activities that are (i) germane to collective bargaining; (ii) advance labor peace and avoid free-rider problems; and (iii) do not significantly add to the burden on First Amendment rights that inheres in the allowance of an agency shop. *See Lehnert v. Ferris Faculty Assn*, 500 U.S. 507, 519 (1991). The Court's opinion decides the case on the second *Lehnert* consideration—that these plaintiffs are not free-riders—and holds that, on this record, non-members of the union employed by the State as probation officers may not be assessed for the expense of organizing people in the private sector who work as couriers, or in the food service industry, or with persons having developmental disabilities.

At the same time, the opinion leaves open the possibility that certain additional averments, if made, might (or might not) render the plaintiffs free-riders to some unstated degree or percentage. *See* Majority Op. at 13-14. The Court's opinion does an admirable job of searching and parsing the present record, and I can hardly deny that additional averments of other facts may affect whether a nonmember of a union may become a free-rider; so I concur.

But I would decide this case on an alternative basis that is simple, obvious, and available. Giving

effect to the third *Lehnert* consideration, I would hold—categorically—that the First Amendment is violated when public-sector unions charge dissenting nonmembers the cost of organizing private-sector employees.

B

"To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). *Abood* considered the First Amendment implications of a public-sector union's use of dissenting nonmembers' compelled fees for several activities, some of them related to collective-bargaining, some not. The Court held that "insofar as the [challenged] service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes," there is no First Amendment violation. *Id.* at 232 (relying on *International Assn of Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956)). But the First Amendment is violated when a public-sector union requires a dissenting nonmember to pay for "the support of an ideological cause he may oppose." *Abood*, 431 U.S. at 235.

In *Abood*, the Court had no occasion to consider the "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id.* at 236. Such lines were later drawn in *Lehnert*, which acknowledged that permissible agency shop fees burden the First Amendment rights of dissenting nonmembers to some irreducible degree, but listed three considerations that deter-

mine whether that burden exceeds the irreducible (and acceptable) minimum. *See Lehnert*, 500 U.S. at 518-19; *see also Seidemann v. Bowen*, 584 F.3d 104, 111 (2d Cir. 2009). As these three considerations (listed at the beginning of this concurrence) reflect, even activities that assist collective bargaining may nevertheless impose an impermissible burden on expression. On summary judgment, I accept the union-sponsored averment that organizing in the private sector assists collective bargaining on behalf of government workers (however attenuated and counter-intuitive that averment is); at the same time, however, such organizing imposes an impermissible burden on expression.

Lehnert teaches that there is likely to be an impermissible infringement on First Amendment rights when the challenged expenses relate to "expressive and ideological content . . . about which individuals hold strong personal views" and when "the compelled speech is in a public context." *Lenhert*, 500 U.S. at 521-22. All union organizing is conducted by the public expression of views and ideas on which people can—and do—divide; and organizing that aims to expand public employment is especially controversial and divisive. For that reason, the challenged expenditures cannot be charged to the plaintiffs.

C

There can be no doubt that organizing expenses underwrite expressive and ideological content—here, that government employment should be augmented and that privatization should be frustrated and prevented. CSEA does not disagree. CSEA's Director of Organizing defends the chargeability of organizing expenses on the express ground that they help "main-

tain the wages, benefits and working conditions for CSEA's membership and . . . stem the loss of jobs [to workers in the private sector] for members of CSEA's bargaining unit." Decl. of Benjamin I. Gordon ¶ 29; *see also id.* ¶ 39 ("In sum, a major focus of CSEA's organizing efforts is to stem the loss of jobs of employees represented by CSEA and to protect the wages and benefits of those employees from declining due to the presence of unorganized and lesser paid employees in the private sector."). And in this appeal, CSEA affirmatively argues that its "organizing efforts [are] essential to deter public-sector employers from privatizing or contracting out the jobs of bargaining-unit members." Appellees' Br. at 7. But the more CSEA contends that the expenditures at issue are made to defeat privatization and promote government employment, the more CSEA reinforces the conclusion that such organizing is a quintessentially political act: "[D]ecisionmaking by a public employer is above all a political process." *Abood*, 431 U.S. at 228.

At the risk of being obvious, there is intense political controversy over privatization: what services the government should provide; whether and how much those services should expand; and which of those services should be contracted out.[1] Few political

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[1] The Supreme Court has long acknowledged the lively debates over unionism, especially in the public sector. *See, e.g.*, *Abood*, 431 U.S. at 229 ("The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model."); *id.* at 225 n.20; *Hanson*, 351 U.S. at 233-34 ("Powerful arguments have been made here that the longrun interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis

issues are so consequential, divisive, and heated. On such matters, "worker and union cannot be said to speak with one voice." *Lehnert*, 500 U.S. at 521. Government employees are also citizens, ratepayers, property owners, and members of families. Families with one member working for the government may include others working in the private sector. The union-sponsored affidavits argue that organizing the private sector reduces competition with government workers—although this seems to be a futile project.[2] In any event, courts should not presume that such a union goal trumps the First Amendment right to agitate for reform, austerity, and economy in government.

Finally, union organizational activity necessarily takes place in public—outside the union, outside the unionized workplace, and outside the halls and lobbies of the legislature. In that public context, the CSEA makes one argument to which all others are subsidiary: that union membership confers net benefits—a political and ideological perspective that is not obviously shared by dissenting workers in a union shop.

. . . wrote forcefully against the closed shop."); *id.* at 235 ("To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course.").

[2] Protecting government work by organizing the private sector is like trying to insulate one's home by heating the backyard. And since zoo-keepers are in the same bargaining unit as the probation officers, the causation principle becomes particularly zany in this case. Perhaps it is thought that food-service workers in the private sector compete for jobs with public-zoo workers who feed the seals.

These considerations compel the conclusion that organizing activities "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Accordingly, and consistent with the First Amendment, public-sector unions should never be allowed to charge dissenting non-members the cost of organizing private-sector employees.

"Political speech must prevail against laws that would suppress it," because "[t]he First Amendment confirms the freedom to think for ourselves." *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 898, 908 (2010). The right at issue in *Citizens United* was the right to engage in political speech. The obverse right—the right not to engage in political speech—commands the same level of protection. *See Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid . . . . The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas. . . . There is necessarily . . . a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." (internal quotation marks and emphases omitted)). Plaintiffs here have a right to be free from assessments used to promote views on public subjects—views that they do not choose to express, or affirmatively reject.

That is the basis on which I would decide this case.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[Filed 10/24/2006]

05-CV-6700

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, LAURA J. SWARTZENBERG AND ROSARIO ZOCCO,

Plaintiffs,

VS.

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828, THE CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000, AFL-CIO AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendants.

DECISION and ORDER

INTRODUCTION

Plaintiffs David Scheffer, Mary Bergevin, Joseph Stephany, Laura Swartzenberg and Rosario Zocco bring this action against defendants Civil Service Employees Association, Local 828; Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO; and the American Federation of State, County and Municipal Employees, AFL-CIO, claiming that the defendants violated their civil rights by unlawfully collecting and distributing union fees in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. Specifically,

the plaintiffs, who are Probation Officers employed by the County of Monroe, New York, have filed a motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all others similarly situated.

Plaintiffs allege that the defendants seized union fees from the wages of plaintiffs and each member of the class plaintiffs seek to represent, in the absence of the notice and procedural safeguards required by the First Amendment and further that defendants used fees collected from plaintiffs wages and each member of the subclass of objecting nonmembers plaintiffs seek to represent, for non-bargaining activities such as organizing. Plaintiffs also request that their counsel be appointed class counsel under Rule 23(g) of the Federal Rules of Civil Procedure. Defendants oppose the motion mainly on the basis that plaintiffs' attorneys cannot represent the class due to their well known hostility to unions on political and ideological grounds.

After a review of all the motion papers in support of and in opposition to the motion for class certification and for the reasons set forth below, I deny the National Right to Work Legal Defense Foundation's application to be appointed as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure and I defer the decision regarding the motion for class certification until after substitute counsel has been appointed.

BACKGROUND

Plaintiffs are employed by Monroe County, New York as probation officers. Plaintiffs are "public employees" within the meaning of N.Y. Civ. Serv. Law § 201(7)(a). Plaintiffs are employed in a bargaining

unit represented by the Civil Service Employees Association, Inc. ("CSEA"), Local 1000, AFSCME, AFL-CIO, Monroe County Employee Unit, Local 828 ("Local 828"). CSEA is a labor organization that is recognized as the collective bargaining agent for over 200,000 employees in New York state. Of the employees in the various bargaining units CSEA represents, approximately 91% have become members of the union and thus support the union's representational efforts through their dues payments. The remaining 9% (approximately 18,702 persons statewide) have declined to become union members. Monroe County has recognized CSEA as the exclusive representative, for collective bargaining purposes, in plaintiffs' bargaining unit.

Plaintiffs are required to pay fees to Local 828, CSEA and AFSCME. Both New York state law and federal labor law require that a union certified as exclusive bargaining agent shall fairly and equally represent all employees in the bargaining unit it represents, e.g. through grievance and arbitration process whether or not they are dues-paying members of the union. To help equalize the financial burden of this representation among union members and nonmembers, New York allows public sector unions to collect an "agency shop fee" in an amount equal to union dues from employees the union is required to represent who choose not to be union members. The New York statute also provides, however, that a union collecting an agency shop fee must maintain a procedure for refunding to any nonmember who so requests the portion of his or her agency shop fee that corresponds to the union's expenses for "activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

In deference to the First Amendment non-associational rights of nonmember fee payers, the Supreme Court has ruled that nonmembers who have an objection to paying for a union's political or ideological activities can only be required to pay a reduced agency fee that excludes the portion of union dues allocated for political and ideological expenditures not relevant to the union's representational function. In the absence of an objection, therefore, a union may lawfully collect the equivalent of its full dues from the nonmembers it represents. To ensure that nonmembers are able to make an informed decision on whether to file an objection, the Court has also developed a set of prophylactic procedures that unions must follow in collecting an agency fee, including the requirement that nonmembers be given notice of the basis for the union's calculation of its expenses that are chargeable and non-chargeable to objectors, along with the opportunity to register their objection to paying the non-chargeable portion of the agency fee.

According to defendants, in compliance with these requirements, CSEA annually sends to all nonmembers subject to an agency fee requirement an "agency shop notice" setting forth the union's calculations of its chargeable and non-chargeable expenses and explaining how to register an objection.

Defendants have collected union fees from non-member employees represented by affiliates of CSEA since November 2002. CSEA receives union fees from non-objecting members and uses fees collected for non-bargaining activities such as organizing. Plaintiffs allege that it is CSEA's responsibility to provide non-union member employees represented by affiliates of CSEA with notice of their rights in accordance with

the law. However, plaintiffs claim they were not provided with the required notice of the nonmember employees' rights.

Until June 2005, all five plaintiffs were and had been since beginning employment, dues-paying members of the union. In that same month, all five submitted very similar letters to CSEA resigning their union membership and requested refunds of that portion of the agency shop fees they would have to pay that corresponded to the union's political and ideological expenses not relevant to its collective bargaining function. Accordingly, plaintiffs were treated as agency fee objectors for the union's 2005-2006 fiscal year and were sent approximately $31.04 on a quarterly basis for the non-chargeable portion of the fees.

Plaintiffs demand not only declaratory and injunctive relief, but also full restitution to all agency fee payers in the state of the full amount of the fees they have paid as well as punitive damages.

DISCUSSION

I. Class Counsel Must Adequately Represent the Interests of the Class

Defendants' argue that plaintiffs' counsel are employees of an organization who's objectives in this and similar litigation is to weaken public-sector unions, which is not in the interests of the employees of those unions they represent (members or non-members), but for the principle benefit of the opposing interests of taxpayers. Plaintiffs' counsel, the National Right to Work Legal Defense Foundation (the "Foundation") is pursuing these claims and remedies that are consistent only with that objective, and not with the interests of many of the class members they seek

to represent. Thus, their representation is not free of conflict as required by Rule 23(g)(1), F.R.C.P.

Defendants rely on *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989) and its progeny. In *Gilpin*, Judge Posner analyzed the problem presented where, as here, named plaintiffs represented by ideologically motivated attorneys from the Foundation seek to represent a class of all nonunion employees required to pay agency fees. In affirming a district court's denial of class certification, the Seventh Circuit identified an inherent conflict between the type of claim asserted by the Foundation attorneys and the interests of a substantial number of class members who do not share the Foundation's ideological hostility to unions. Judge Posner explained as follows:

> A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately . . . . Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with-and only with-the aims of the first type of employee.

Id. at 1313. Thus, the court opined that "[t]he National Right to Work Foundation is not an adequate litigation representative" of employees "who, while not wanting to pay more (and perhaps even wanting to pay less) than their 'fair share' fees, have no desire to ruin the union or impair its ability to represent them effectively . . . ." *Id.*; *See also Kidwell v. Transp. Comm. Int'l Union*, 946 F.2d 283, 305-06 (4th Cir. 1991) ("We agree with the Seventh Circuit. The plaintiffs, once again represented by the National Right to Work Legal Defense Foundation, are not adequate representatives under Rule 23"); *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992).

I agree with the defendants that *Gilpin* is applicable here. The Foundation's real objective is political notwithstanding its claimed objective of being a "charitable public interest, legal aid organization." *See* Milton Chappell Declaration ("Chappell Decl."), ¶ 2. In fact, as the Foundation's president stated in a confidential internal memorandum produced in discovery "I realize that, as a charitable entity, we are constrained to activities which can be defended as charitable. However, I believe our real aim is dedicated to "reducing union political influence over society." *See* Declaration of John West ("West Decl."), Ex. A. The Foundation is dedicated to "reducing union political influence over society." *See* West Decl., Ex. B, p.4. The Foundation's manner of pursuing this objective is by triggering legal attacks that seek to impair the ability of unions to collect agency fees from nonmembers whom they represent in collective bargaining in what the Foundation describes as "forced unionism."[1] *Id.*

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[1] The Foundation's fund-raising literature states that "[n]o other national legal organization focuses exclusively on disman-

The Foundation's fund-raising correspondence illustrates how the organization plans to use the judicial process to further its agenda. For instance, in an April 2001 letter to its supporters, the Foundation states that:

> National Right to Work Foundation attorneys are making big strides with a strategy that can take huge bites out of the union bosses' illegal amassed power.
>
> A strategy that – IN A SINGLE COURT CASE – frees hundreds, thousands, sometimes tens of thousands of workers from Big Labor's clutches.
>
> A strategy that – IN A SINGLE COURT CASE – forces union fat cats to return millions of illegally seized dollars to workers (and often pay a portion of your Foundation's legal expenses!)
>
> What is the strategy?
>
> Class-action lawsuits.

See Alexander Decl., Ex. B., p.4 (emphasis in original). In pursuing its strategy of opposing union influence through class action lawsuits, the Foundation views its mission as taking on "[t]he unions' attorneys and judges who are frequently beholden to union political power [and] will continue to abuse the rights of workers." *See* West Decl., Ex. B., p.4. The Foundation's literature clearly demonstrates its forceful campaign against unionization in the public sector. Indeed, the literature states that its goals are to help keep taxes down by making it more difficult for unions to resists privatization of public sector employment and otherwise protect public employees' wages and jobs. The Foundation indicates that "government in a non-

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tling forced unionism - the engine that drives the far-left political machine."

Right to Work state is 55.6 percent more expensive and the taxpayer burden is $592 higher (per capita) than in a Right to Work state".[2] *See* Alexander Decl., Ex. D., p. 69. Thus, "taxpayers like you and me" are left "to soak . . . and . . . soak and soak." *See* Alexander Decl., Ex. C, p. 1 (emphasis in original).

Consequently, the objective of the Foundation in its public sector cases is to "free all American citizens and taxpayers (not just employees) from the evil effects of union abuse," and as a result "strik[e] a blow for taxpayers everywhere." *See* Alexander Decl., Ex. C, p. 5 (emphasis in original). Indeed the Foundation informs its contributors that the "Foundation attorneys can break the back of Big Labor's government employee forced-dues empire . . . ." *Id.* (emphasis in original). To succeed in this endeavor, Foundation lawyers claim they are ready to methodically exert utmost pressure on Big Labor by "[s]lam[ming] into union bosses with class action lawsuits" and "[s]eek[ing] precedent-setting punitive damages." *Id.* at p.4 (emphasis in original).

In accordance with its goals, the Foundation attorneys have commenced this action against CSEA and its affiliates. The legal issues on which this

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[2] The Foundation explains the higher cost of government services in state where agency fees are prohibited as follows: By taking over local, state, and federal workers, Big Labor.

- Rakes in hundreds of millions of dollars in forced dues from civil servants to dump into radical Tax-and-Spend politics.
- Blocks government reforms that improve services and save taxpayers money . . . especially privatization . . . .
- Drives up taxes and busts budgets. Already bloated government spending skyrockets as politicians scramble to pay off their union-boss masters.

See Alexander Decl , Ex. C, p. 3 (emphasis in original).

lawsuit is based are narrow, i.e. whether organizing expenditures are chargeable, and whether separate breakdowns are required for CSEA's expenditures on rebates to its local subdivisions. However, the relief sought is broad i.e. an order for full restitution to all fee payers of the entire agency fee they paid in the relevant year(s)—including portions of the fee that are undeniably chargeable even to those fee payers who object to paying for expenditures unrelated to the union's collective bargaining function. Such a remedy has been described as punitive in nature.[3] *See Gilpin*, 875 F.2d at 1315 (Court held plaintiffs sought severely punitive remedy and not one properly described as restitution).

Here, the Foundation attorneys' motives are even more apparent since they seek not only the punitive remedy of restitution but also the actual remedy of punitive damages. The defendants claim that class counsel "must serve the interests of the entire class," and that the Foundation attorneys do not meet that requirement. *See* Fed. R. Civ. P. 23(a)(4). In *Gilpin*, Judge Posner stated that the "'restitution' remedy sought by the National Right to Work Legal Defense Foundation is consistent with those union members who are hostile to unions on political and ideological grounds but inconsistent with those union members who are happy to be represented by a union but won't pay any more for that representation than he is forced to." *See Gilpin*, 875 F. 2d at 1313. As a result, these two groups have divergent claims. Thus, *Gilpin*

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[3] As seen from some of the deposition testimony, the named plaintiffs were unaware that the Foundation attorneys were going to seek restitution remedy for the full agency fee. *See* Stephany Dep. 41-411 Swartzenberg Dep 23-24; Zocco Dep. 40-41; Scheffer Dep. 32 and Bergevin Dep. 35.

correctly holds that a demand for full restitution of fees creates a conflict of interest within the putative class because the demand is so adverse to the interests of employees who do not wish to "weaken and if possible destroy the union." *Gilpin*, 875 F.2d at 1313. The choice of remedies and legal claims the Foundation has opted to bring mirrors its resolve of "break[ing] the back" of public-sector unions and undermining their ability to seek improvement of wages and benefits of the public-sector workers they represent.

Moreover, as defendants have shown, the Foundation seeks to use public employees who are not union members as pawns in litigation that is being conducted in the interest of taxpayers, with the ultimate purpose of denying unions the funds they need to advance the interests of those very nonmembers plaintiffs purport to represent. These actions clearly reveal the type of conflict of interest described by Judge Posner in *Gilpin*. The Foundation has demonstrated that its aim in commencing class action lawsuits similar to this case is to defend the interests of the taxpayers who are forced to pay those public employees' salaries and benefits by weakening the ability of unions to achieve gains for public sector employees that entail costs to taxpayers, and making it harder for unions to resist privatization of public-sector jobs including those of the class members the Foundation seeks to represent here. *See* Alexander Decl., Ex. C pp. 3-4.

II. The Foundation's Mission Conflicts with Plaintiffs' Interests in This Case

Rule 23(g) guides the court in determining whether counsel is qualified to serve to represent the class. Fed. R. Civ. P. 23 (g). It responds to the reality that the selection and activity of class counsel are often

critically important to the successful handling of a class action. This subdivision recognizes the requirement of undivided loyalty of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. *See* 2003 Amendments to Advisory Committee Notes of Rule 23 (g) (1) (C). The rule establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. *Id*. Thus, after review of all applicants, "if the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel." *Id*.

Here, the plaintiffs are represented by Milton L. Chappell and John R. Martin, staff attorneys employed by the Foundation. The Foundation exists for the purpose of assisting workers whose rights are "violated by compulsory unionism." *See* West Decl., Ex. F. The Foundation attorneys insist that they will fairly and adequately represent the interests of the plaintiffs and the putative class. *See* Chappell Decl. ¶ 4; Martin Decl. ¶ 4. Foundation counsel argue that they should be appointed class counsel since it has been held that attorneys employed by legal aid organizations may serve as class counsel. Further, Foundation attorneys have sworn that they will exercise independent judgment in conducting this litigation and will base decisions on best interest of clients and not the Foundation since they are bound by same rules of procedure and conduct as are all

counsel in federal court. *See* Chappell Decl. ¶¶ 4-6 and Martin Decl. ¶¶ 4-6.

Defendants object to their appointment as class counsel and allege that the Foundation is well know for its hostility to unions on political and ideological grounds, which drives their demand for punitive remedies being requested in this case. *See* Defendants' Memo at p. 22. Defendants' argue that plaintiffs' counsel are employees of an organization that admits that its objectives in this and similar litigation is to weaken public-sector unions and to do so not in the interests of the employees those unions represent (members or nonmembers), but in the opposing interests of taxpayers. Plaintiffs' counsel and its employer are pursuing these claims and remedies that are consistent only with that objective, and not with the interests of many of the class members they seek to represent.

Based on the documents produced in this litigation and notwithstanding Foundation counsels' arguments to the contrary, it is clear that Foundation attorneys are not able to separate themselves from the Foundation and its ideological agenda. For instance, the Foundation tells its contributors that it is sending "Foundation attorneys" into battle to "break the back of Big Labor's government employee forced-dues empire" and to "strik[e] a blow for taxpayers everywhere." *See* Alexander Decl., Ex. C. p. 5. Moreover, the non-lawyer Foundation personnel have influence over litigation strategy and case management of these actions. Indeed, Foundation counsel and the non-lawyer staff, specifically its public relations department, work closely together to utilize the Foundation's litigation program to advance the

Foundation's institutional interests in publicity and fund-raising. *See* West Decl., Ex. D, E, and F.[4]

Notwithstanding the Foundation attorneys assurances, this Court remains unconvinced of their undivided loyalty to the plaintiffs and the putative class. The goals of Foundation counsel conflict with the very foundational objectives of the CSEA. As discussed above, the basis for the class action, which is to seek a refund of a portion of the plaintiffs' union dues used for political or ideological purposes, is inconsistent with the Foundation's goal in pursuing its strategy of weakening public employee union influence through class action lawsuits. *See* Alexander Decl., Ex. B. The saving grace of the Foundation attorneys' argument is that they wish to protect union members against the abuses imposed upon them by union political power. Of course, this goal benefits the public because, as the Foundation has stated, "in the past two decades, government union ranks have more than doubled . . ." the consequence of which is ". . . higher taxes" and "run away government spending." Accordingly, the benefits of a class action allowing for limited recovery of a portion of the union dues used for political or ideological purposes is collateral to the Foundation's stated goals, which are anti-union and limit government employee unions from growth and pursuing legitimate collective bargaining on behalf of the union membership.

---

[4] For example, Foundation attorneys are under strict instructions to coordinate their filings with the Foundation's public relations department. They are also required to use what the Foundation prescribes as ideologically correct language in their legal papers in order to comply with the instructions of their employer, the Foundation.

Thus, Foundation counsel are clearly in conflict with the objectives of the plaintiffs and the putative class and cannot act in their best interest. *See Runion v. U.S. Shelter*, 98 F.R.D. 313, 318 (D.C.S.C. 1983) (Under rule determining class actions, district court acts as fiduciary who must serve as guardian of rights of absent class members even prior to certification).

III. Appointment of Substitute Counsel and Deferral of Motion for Class Certification

Because I determine that the Foundation attorneys cannot act in the best interests of the plaintiffs and the putative class, the remaining motion for class certification is held in abeyance until the putative class is represented by substitute counsel. *See Sterling v. Envtl. Control Bd. of the City of NY*, 793 F.2d 52, 58 (2d Cir. 1986) (Whether a case should proceed as a class action is "peculiarly within the discretion of the trial judge") (quoting *Becker v. Schenley Indus., Inc.*, 557 F.2d 346, 348 (2d Cir. 1977); *see also Sarino v. Computer Credit, Inc.*, 173 F.R.D. 346, 351 (E.D.N.Y. 1997). Pursuant to Rule 23(g), I appoint Michael Harren, Esq. of the Chamberlain D'Amanda law firm of Rochester, New York to act as class counsel. I further direct Mr. Harren to meet and consult with named plaintiffs regarding his representation of their interests and the interests of the putative class in this case. Mr. Harren shall report back to the Court within 20 days from the date of this Order whether or not an attorney-client relationship can be established with the class members. If so, the Court will entertain any motions that plaintiffs determine are necessary to proceed with the lawsuit.

CONCLUSION

Upon consideration of plaintiffs' motion for class certification and appointment of class counsel as well as defendants papers submitted in opposition to the motion, and plaintiffs' reply to the opposition, it is hereby ORDERED as follows:

1) The National Right to Work Legal Defense Foundation's application for appointment as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure is denied;

2) Plaintiffs' motion for class certification is held in abeyance until the putative class is represented by substitute counsel;

3) Pursuant to Rule 23(g), I appoint Michael Harren, Esq. of the law firm of Chamberlain D'Amanda of Rochester, New York to act as class counsel. Mr. Harren is further directed to meet and consult with the named plaintiffs regarding his representation of their interests and the interests of the putative class in this case;

4) Within 20 days from the date of this Order Mr. Harren shall report back to the Court whether or not an attorney-client relationship can be established with the class members. If so, the Court will entertain any motions that the plaintiffs determine are necessary to proceed with this lawsuit.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
October 24, 2006

APPENDIX C

UNITED STATES DISTRICT COURT
Western District of New York
272 United States Courthouse
100 State Street
Rochester, New York 14614

Chambers of
Michael A. Telesca
District Judge

Chambers: 585-613-4060
Fax: 585-613-4065

November 22, 2006

Mr. David H. Scheffer
385 Washington Street
Spencerport, New York 14559

Ms. Mary C. Bergevin
94 Alverstone Way
West Henrietta, New York 14586

Mr. Joseph Stephany
161 Northfield Road
Rochester, New York 14617

Ms. Laura Swartzenberg
1733 Apple Hollow Lane
Hamlin, New York 14464

Ms. Rosario Zocco
129 Wyndale Road
Rochester, New York 14617

Re: Scheffer, et al v. CSEA Local 828
05-CV--6700

Dear Plaintiffs:

Each of you are listed as plaintiffs in the above action against CSEA Local 828. I issued a decision on October 24, 2006 in which I substituted Mr. Michael

Harren as attorney to appear on your behalf in the above lawsuit. I understand that Mr. Harren contacted you and you do not wish to have him represent you. Understand, that my decision disqualified your counsel from representing you in this action for the reasons stated in that decision.

If you intend to pursue this case, please have your substitute counsel file a notice of appearance with the Court within 30 days (December 22, 2006). I must advise you that I will not permit this case to proceed as a class action without the class representatives being represented by counsel. Therefore, if you fail to respond to this order within 30 days, I shall have no alternative but to dismiss this case for failure to prosecute. I would prefer not to do this and, therefore, urge you to have your substitute counsel file a notice of appearance and contact this Court within the time period prescribed in this letter.

ALL OF THE ABOVE IS SO ORDERED.

Very truly yours,

/s/ Michael A. Telesca
Michael A. Telesca
United States District Judge

MAT/jc

cc: Honorable Marian Payson
Maria Herrera-Jaarsma, Law Clerk
Melissa Schoen, Courtroom Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
Western District of New York
272 United States Courthouse
100 State Street
Rochester, New York 14614

Chambers of
Michael A. Telesca
District Judge

Chambers: 585-613-4060
Fax: 585-613-4065

December 4, 2006

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Mr. Joseph Stephany
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Rochester, New York 14617

Ms. Laura Swartzenberg
1733 Apple Hollow Lane
Hamlin, New York 14464

Ms. Rosario Zocco
129 Wyndale Road
Rochester, New York 14617

Re: Scheffer, et al v. CSEA Local 828
05-CV--6700

Dear Plaintiffs:

I have your letter of November 28, 2006 which requests that "[we] want our current attorneys to continue representing us in this case, and we would

like the Court to appoint our attorneys as class counsel." For the detailed reasons stated in my decision dated October 24, 2006, I denied the National Right to Work Legal Defense Foundation's application for appointment as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure. My decision stands and your request that I permit your current attorneys to continue representing you is denied. Note also that my decision held that the motion for class certification would be held in abeyance until "the putative class is represented by substitute counsel."

Be advised that if you intend to pursue this case, please have your substitute counsel file a notice of appearance with this Court by no later than December 22, 2006. Again, I must advise you that I will not permit this case to proceed as a class action without representation by appropriate class counsel. If you fail to respond to this Order by December 22, 2006, I shall have no alternative but to dismiss this case without prejudice for failure to prosecute. Again, I wish to reiterate that I would prefer not to do this and, therefore, urge you to have your substitute counsel file a notice of appearance and contact this Court by December 22nd as previously ordered.

ALL OF THE ABOVE IS SO ORDERED.

Very truly yours,

/s/ Michael A. Telesca
Michael A. Telesca
United States District Judge

MAT/jc

cc: Honorable Marian Payson
United States Magistrate Judge
Maria Herrera-Jaarsma, Law Clerk
Melissa Schoen, Courtroom Deputy

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[Filed 12/21/2006]

05-CV-6700

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, LAURA J. SWARTZENBERG AND ROSARIO ZOCCO,

Plaintiffs,

vs.

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828, THE CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000, AFL-CIO AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendants.

DECISION AND ORDER

INTRODUCTION

Plaintiffs David Scheffer, Mary Bergevin, Joseph Stephany, Laura Swartzenberg and Rosario Zocco bring the instant motion requesting a stay and leave to appeal this Court's October 24, 2006 Decision and Order ("October 24 Decision"), which denied plaintiffs' counsel's application for appointment as class counsel and held in abeyance plaintiffs' motion for class certification until the putative class is represented by substitute counsel. In the alternative, plaintiffs request reconsideration of this Court's October 24 Decision. In addition, defendants Civil Service

Employees Association, Local 828; Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO; and the American Federation of State, County and Municipal Employees, AFL-CIO bring a motion seeking to clarify this Court's ruling in its October 24 Decision regarding the adequacy of class counsel. For the reasons stated below, plaintiffs' motion for a stay and leave to appeal or, in the alternative, for reconsideration is denied. Defendants' motion to clarify this Court's ruling is granted.

BACKGROUND

Plaintiffs are Probation Officers employed by the County of Monroe, New York, who allege that defendants seized union fees from their wages in the absence of notice and procedural safeguards required by the First Amendment, and further that defendants used fees collected from plaintiffs' wages for non-bargaining activities such as organizing.

On April 5, 2006, plaintiffs filed a motion for class certification and also requested that their counsel be appointed class counsel pursuant to Rule 23 of the Federal Rules of Civil Procedure. On August 3, 2006, defendants opposed the motion pointing out, among other things, that plaintiffs should abandon their restitution and punitive damages claims because those claims create a conflict of interest, which disqualifies the plaintiffs' attorneys as potential class counsel. Notably, on September 27, 2006, after defendants filed their opposition papers and nearly six months *after* the motion for class certification was filed, plaintiffs filed a motion to amend their complaint in which they abandoned any claim for either punitive damages or full restitution.

In my October 24, 2006 Decision and Order, I denied counsel's application for appointment as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure, and held in abeyance plaintiffs' motion for class certification until the putative class was represented by substitute counsel. Contrary to the plaintiffs' contention, this Court did not alternatively require and/or order that the class be represented by attorney Michael Harren. *See* October 24 Decision at 16-17. Rather, the plaintiffs were granted the option of entering into an "attorney-client relationship" with him.[1] *See id.* Plaintiffs now seek a stay and leave to appeal the October 24 Decision, or, in the alternative, seek reconsideration of that Order. Defendants also move to clarify this Court's ruling concerning the adequacy of class counsel.

DISCUSSION

I. Interlocutory Appeal Under Section 1292(b)

Pursuant to 28 U.S.C. § 1292(b), a district court may certify a question for interlocutory appeal where the issue involves "a controlling question of law as to which there is substantial ground for difference of opinion," and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." However, a District Court's power to "grant an interlocutory appeal is strictly limited and only exceptional circumstances will

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[1] Indeed, my Decision directed Mr. Harren to report to me within 20 days "whether or not an attorney-client relationship [could] be established with the class members." *See id.* By letter dated November 10, 2006, Mr. Harren reported to me that he was "unable to establish an attorney-client relationship with the class representatives." *See* November 10, 2006 letter attached as Ex. A.

justify certification." *See Genentech, Inc. v. Novo Nordisk A/S*, 907 F. Supp. 97, 99 (S.D.N.Y. 1995) (*citing Klinghoffer v. S.N.C. Achille Lauro*, 921 F. 2d 21, 25 (2d Cir.1990); *See also In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (use of certification procedure is strictly limited and only "exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.")

A. Controlling Question of Law.

Plaintiffs contend that the issue of whether the Court is permitted to take into account the National Right to Work Legal Defense Foundation's ("Foundation") policy pronouncements in determining whether to disqualify its counsel as class counsel is a controlling question of law.[2]

Since the October 24 Decision involves an exercise of discretion that turns on its analysis of the factual record presented by both parties, leave to seek review under § 1292(b) is denied. *See Herold v. Braun*, 671 F.Supp. 936, 937 (E.D.N.Y. 1987) ("Ordinarily a

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[2] Plaintiffs incorrectly argue that the Decision will terminate the action, "because the Court will dismiss the lawsuit if they do not agree to the Court's appointment of Michael Harren as their lawyer." In fact, in a letter order addressed to all plaintiffs dated November 22, 2006, I stated "I understand that Mr. Harren contacted you and you do not wish to have him represent you. . . . I must advise you that I will not permit this case to proceed as a *class action* without the class representatives being represented by counsel." Again in a letter order dated December 4, 2006, I advised plaintiffs that I would "not permit this case to proceed as a *class action* without representation by appropriate class counsel." Nowhere in any of my orders did I indicate that I would dismiss plaintiffs' action if they did not agree with my appointment of Michael Harren as their class counsel.

district court should refuse to certify matters . . . that lie within its discretion.") (citations omitted). Moreover, the October 24 Decision is not controlling because it neither terminates the action nor "influence[s] the outcome of many other cases." *See Genentech*, 907 F. Supp. at 99. Plaintiffs assert that this Court's Order is controlling because it will "significantly alter the conduct of this action" because new class counsel will present the case differently than the Foundation's counsel. Plaintiffs Br. ("Pls. Br.") at 9. However, it has not yet been determined who the substitute counsel will be, or even whether the case will be certified as a class action. Accordingly, it is at best, speculative for plaintiff to state that the October 24 Decision will alter the conduct of this lawsuit in any way that warrants review by interlocutory appeal. Moreover, because this Decision will permit the Foundation's counsel to represent plaintiffs in their individual capacities, their right to pursue their individual claims with counsel of their own choosing remains protected.

B. Material Advancement of the Ultimate Termination of the Litigation.

Plaintiffs assert that when final judgment is entered, plaintiffs will appeal the October 24 Decision, which provides for Mr. Harren's appointment as substitute counsel and the denial of the Foundation attorneys' application to be class counsel. Plaintiffs further contend that a successful appeal on that issue alone might require the entire case to be relitigated, which would result in a substantial waste of resources.

Plaintiffs have misstated the facts and have misinterpreted my October 24 Decision. First, the issue concerning Mr. Harren's substitution as class counsel

is moot since as of November 10, 2006, Mr. Harren reported that he was unable to establish an attorney-client relationship with plaintiffs and has had no further contact with them. I, therefore find that an interlocutory appeal would not materially advance this litigation, since the issue they raise is not only untenable, but moot.

II. Motion for Reconsideration

"Reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *In re Health Management Systems, Inc. Sec. Litig.*, 113 F.Supp.2d 613, 614 (S.D.N.Y.2000). Generally, a motion for reconsideration may be granted only where the court has "overlooked matters . . . which, had they been considered, might reasonably have altered the result reached by the court." *Consol. Gold Fields, PLC v. Anglo Am. Corp. of South Africa, Ltd.*, 713 F.Supp. 1457, 1476 (S.D.N.Y. 1989).

A. Plaintiffs Have Failed to Establish That Reconsideration of the October 24, 2006 Decision and Order is Warranted.

Plaintiffs contend that they are entitled to reconsideration of this Court's October 24 Decision because plaintiffs' supplemental complaint abandoned all demands for punitive damages and any class claims for full restitution. Plaintiffs claim that this Court erred because it failed to acknowledge the abandonment of such claims, which if considered by the this Court, would not have supported finding a disquali-

fying conflict under *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989).[3]

It does not go unnoticed that the Foundation attorneys continue to seek remedies that are adverse to the interests of many members of the putative class. The plaintiffs are nonmembers of CSEA Local 828 or CSEA AFSCME Local 1000, yet they continue to seek restitution for all non-members of the union, including those who are not objectors, for the full amount of fees transmitted from CSEA to its subordinate affiliates without regard to whether any portion of that fee is properly chargeable. Pls. Br. at p. 4 n. 12.

B. The Foundation Attorneys May Represent Plaintiffs to Pursue Their Individual Claims, But Not as Class Counsel.

The plaintiffs erroneously interpret the Court's order as denying them their First Amendment right to associate with and select their own counsel. *See* Pls. Br. at 7-8. However, the Court's October 24 Decision determined that the Foundation attorneys were not qualified to serve as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure.[4] Nothing in this Court's decision precludes the Foundation attorneys from representing the plaintiffs in their individual capacities. *See Bobal v. Rensselaer*

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[3] For reasons best known to plaintiffs, they fail to acknowledge that the abandonment of those claims did not take place until two months *after* defendant's opposition was filed.

[4] Plaintiffs allege that "[t]he Decision apparently substitutes Michael Harren not only as class counsel, but also as the Nonmembers' attorney, even though no motion was ever filed to disqualify the Nonmembers' attorneys." *See* Pls. Br. at 5. No reasonable reading of my decision supports this conclusion.

Polytechnic Inst., 916 F.2d 759 (2d Cir. 1990). Thus, contrary to their claim, there is no violation of plaintiffs' First Amendment right since this Court did not deprive them of engaging individual counsel of their choice.

Moreover, this Court did not require that the class be represented by Mr. Harren. Rather, consistent with Rule 23 of the Federal Rules of Civil Procedure[5] this Court gave the plaintiffs the option of entering into an attorney-client relationship with Mr. Harren. The plaintiffs thereafter decided that Mr. Harren was not an acceptable option to represent their interests. In a letter to the Court dated November 10, 2006 Mr. Harren reported that he was "unable to establish an attorney-client relationship" with the class representatives. Therefore, Mr. Harren's involvement ceased as of that date and accordingly, plaintiffs' request for reconsideration on this ground is moot.

III. Clarification of the October 24, 2006 Decision

Defendants filed a motion for clarification of this Court's October 24 Decision on the specific issue of whether the decision only bars the Foundation attorneys from proceeding on behalf of the plaintiffs as class representatives, or whether it also disqualifies them from acting as attorneys for the plaintiffs in their individual capacities. For the reasons stated in the October 24, 2006 Decision, this Court, in considering the plaintiffs' motion for class certification, determined that the Foundation attorneys could

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[5] Rule 23 permits the Court to "invite new applications" or to "make any other appropriate order regarding selection and appointment of class counsel" if the Court finds that the proposed class counsel is inadequate. *See* Fed. R. Civ. P. 23(g)(1)(C), Advisory Committee's Note.

not adequately represent the class. Nothing in that decision prohibits the plaintiffs from having the Foundation attorneys represent them in prosecuting their *individual claims*. Therefore, plaintiffs may, if they wish, pursue their individual claims, with Foundation attorneys representing them. The Foundation attorneys may not, however, represent plaintiffs in the plaintiffs' capacities as class representatives. This case has not yet been certified as a class action, and will continue as a single action brought by the five listed plaintiffs on their own behalf.

CONCLUSION

In my October 24, 2006 Decision and Order, I denied plaintiffs' counsel's application for appointment as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure and held in abeyance plaintiffs' motion for class certification pending the substitution of qualified counsel to represent the putative class. I find no basis to modify that holding, nor do I find any of the issues raised by plaintiffs on this motion appropriate for certification for an interlocutory appeal. Therefore, plaintiffs' motion for certification for interlocutory appeal and motion for reconsideration are both denied.

Plaintiffs' refusal to accept Michael Harren, Esq. as substitute counsel is acknowledged and accepted. Plaintiffs may proceed with counsel of their choice employed by the National Right to Work Legal Defense Foundation to pursue their individual claims, but those attorneys may not serve as class counsel.

Plaintiffs' motion for class certification remains in abeyance.

ALL OF THE ABOVE IS SO ORDERED.

s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
December 21, 2006

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

[Filed 10/26/2006]

05-CV-6700

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, LAURA J. SWARTZENBERG AND ROSARIO ZOCCO,

Plaintiffs,

VS.

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828, THE CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000, AFL-CIO AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendants.

ORDER

On September 27, 2006 plaintiffs David Scheffer, Mary Bergevin, Joseph Stephany, Laura Swartzenberg and Rosario Zocco filed a motion for leave to file Supplemental Complaint (Dkt. No. 34). Defendants Civil Service Employees Association, Local 828; Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO; and the American Federation of State, County and Municipal Employees, AFL-CIO filed opposition papers to plaintiffs' motion for leave to file Supplemental Complaint on October 6, 2006. Thereafter, on October 13, 2006 plaintiff filed a reply to defendants' memorandum in opposition to plaintiffs'

motion. Also pending before this Court was plaintiffs' motion for class certification (Dkt. No. 20). By order dated October 24, 2006, this Court denied the National Right to Work Legal Defense Foundation's application to be appointed as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure for reasons stated in that decision and deferred the determination of the pending motion for class certification. Accordingly, it is hereby:

ORDERED that plaintiffs' motion for leave to file a Supplemental Complaint is denied without prejudice with leave to renew, if appropriate, upon determination by Michael Harren, Esq., substitute counsel.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
October 26, 2006

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Aug. 31, 2010]

Docket No. 07-3683-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand ten.

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, LAURA J. SWARTZENBERG, on behalf of themselves and the class they seek to represent,
Plaintiffs-Appellants,

v.

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828, THE CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000, AFL-CIO, AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Defendants-Appellees.

David Scheffer, Mary Bergevin, Joseph Stephany, et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

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(3)

JAN 18 2011
OFFICE OF THE CLERK

No. 10-719

IN THE

Supreme Court of the United States

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, AND LAURA J. SWARTZENBERG,
Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000; AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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Counsel for Respondents

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QUESTION PRESENTED

Whether, as the Second Circuit held, the district court's refusal to appoint petitioners' attorneys as class counsel under Rule 23(g) was "well grounded in the record," and thus within the district court's discretion, where the record contained evidence from which the court could conclude that the litigation objectives of petitioners' counsel and the organization that employed them and funded the litigation were contrary to the economic interests of the public employees who made up the putative class.

CORPORATE DISCLOSURE STATEMENT

Respondent Civil Service Employees Association, AFSCME, Local 1000 ("CSEA") is organized as a nonprofit corporation. It has no parent corporation, and no publicly held corporation owns any stock in it.

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IN THE

Supreme Court of the United States

No. 10-719

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, AND LAURA J. SWARTZENBERG,
Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000; AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Respondents Civil Service Employees Association, Local 828 ("Local 828"), Civil Service Employees Association, AFSCME, Local 1000 ("CSEA"), and American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") respectfully urge the Court to deny the petition for writ of certiorari. The Petition seeks review of a footnote in the opinion of the Court of Appeals for the Second Circuit, in which that court held that, on the factual record presented, the district court had not abused its discretion in denying the application of petitioners' counsel for appointment as class counsel pursuant to Federal Rule of Civil Procedure 23(g). That fact-bound determination presents no legal issue worthy of this Court's consideration.

STATUTORY PROVISIONS INVOLVED

In addition to the excerpts from Federal Rule of Civil Procedure 23(g)(1) that are quoted in the Petition, Pet. at 3, the following portions of Rule 23(g) are also pertinent:

> (2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). . . .
>
> . . .
>
> (4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

Fed. R. Civ. P. 23(g).

STATEMENT

A. Respondent Civil Service Employees Association ("CSEA") is a labor organization that is recognized, pursuant to applicable state and federal labor-relations statutes, as the collective-bargaining agent for over 200,000 employees, in a variety of occupations, in New York State. That total includes approximately 76,000 state government employees, some 112,000 employed by local governments, and 4,300 private-sector employees. Of the employees CSEA represents, 91% are members of the union, while the remaining 9% – some 18,700 persons statewide – have declined to become union members. Under applicable law and collective bargaining agreements, and as permitted by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), those nonmembers are required to pay "agency shop" fees to help defray the cost of negotiating and enforcing collective bargaining agreements that benefit members and nonmembers alike. As required by this Court's cases, CSEA rebates a portion of the agency shop fee to those nonmembers who voice an objection to paying the por-

tion of union dues that is expended for activities not germane to collective bargaining.

The four petitioners (along with a fifth plaintiff who did not join in the appeal from the district court's judgment) were employed as probation officers by Monroe County, New York, and were part of a bargaining unit of county employees represented by CSEA through its administrative subdivision, respondent Local 828. Plaintiffs were dues-paying members of the union until June 2005, when they submitted nearly identical letters to CSEA resigning their union membership and stating their objection to paying for union activities not related to collective bargaining. Plaintiffs were, accordingly, treated thereafter as agency fee "objectors" and were sent quarterly rebate checks in advance to reimburse them for the "nonchargeable" portion of the agency shop fees that were withheld through payroll deduction pursuant to New York statute.

B. Notwithstanding that their requests for nonmember "objector" status had been fully respected, plaintiffs – represented by attorneys employed by the National Right to Work Legal Defense Foundation ("Foundation") – filed this class action lawsuit some six months after resigning their union memberships, alleging in general terms that the union had violated their rights under the First Amendment in connection with its collection of agency fees. As subsequently clarified through interrogatory answers, their complaint advanced two claims on behalf of the putative class: (1) that CSEA's expenditures for "organizing" should not have been classified as chargeable to objecting agency fee payers; and (2) that CSEA's explanation of the basis for its agency fee – provided annually to all nonmembers as required under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) – was insufficient because of its reliance on a presumption in calculating the chargeable percentage of the funds CSEA disbursed to its 1,300 local administrative subdivisions.

Despite the fact that these claims implicated only a portion of the fees charged to objectors, the complaint filed by the Foundation attorneys demanded the return of *all* agency shop fees (even the portion that was indisputably chargeable to objectors) paid by *all* nonunion employees (even those who had not elected objector status).[1] In addition, the complaint demanded punitive damages.

Following discovery, plaintiffs moved under Rule 23 for certification of a statewide class of all nonunion employees in CSEA-represented bargaining units who since November 2002 had been required to pay agency shop fees to the union. Plaintiffs also asked that their Foundation-provided attorneys be appointed as class counsel pursuant to Rule 23(g).

In addressing that motion, the district court, Hon. Michael A. Telesca, declined to appoint the Foundation attorneys as class counsel, and otherwise held in abeyance the class-certification motion. In making its determination, the court relied on evidence in the record indicating that the Foundation's objective in bringing class action lawsuits on behalf of public-sector employees against their union representatives was to "defend the interests of the taxpayers who are forced to pay those public employees' salaries and benefits by weakening the ability of unions to achieve gains for public sector employees that entail costs to taxpayers ...." Pet. App. at 39a. And, based on discovery documents and counsel's conduct of the litigation, the court found that the "Foundation attorneys are not able to separate them-

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[1] All of the plaintiffs testified on deposition that the idea of demanding "restitution" of all agency shop fees collected by the union originated with their Foundation attorneys; and some of the plaintiffs said they were unaware that the complaint would include such a demand until after it had been filed. Pet. App. at 38a & n.3; CA2 App. at 87, 102, 116, 128, 139-40.

selves from the Foundation" in litigating the case. *Id.* at 41a. As a result, the court concluded that the Foundation-employed attorneys did not meet "the requirement of undivided loyalty of class counsel," *id.* at 40a, imposed by Rule 23(g).

Having held that plaintiffs' counsel could not adequately represent the putative class of public-sector employees, the court initially appointed a local labor attorney as substitute class counsel in order to determine "whether or not an attorney-client relationship can be established with the class members." *Id.* at 43a. After the plaintiffs indicated their unwillingness to accept that attorney as their counsel, the district court twice urged them to identify other substitute counsel of their choice as potential class counsel. *Id.* at 46a, 48a. Upon plaintiffs' refusal to do so, however, the court permitted the litigation to proceed with the Foundation attorneys representing plaintiffs in prosecuting their claims only in their individual capacities. *Id.* at 55a-57a.

The parties thereupon filed cross-motions for summary judgment. Granting defendants' motion, the district court upheld the procedures used by CSEA to calculate the chargeable percentage of its disbursements to its local administrative subdivisions, holding that it was reasonable and constitutionally permissible under the circumstances for CSEA to use a presumption that the chargeable percentage of those expenditures was at least as great as the chargeable percentage of its overall expenditures. *Scheffer v. CSEA*, No. 05-CV-6700, 2007 WL 2126286, at **7-10 (W.D.N.Y. July 25, 2007). Turning to the chargeability of CSEA's organizing expenditures, the court concluded "that organizing private-sector employers operating in the same competitive market as CSEA-represented [public-sector] bargaining units, is germane to protecting, through collective bargaining, the wages,

benefits and working conditions of bargaining unit members," *id.* at *13, and that CSEA's expenditures for this purpose therefore were chargeable to objecting agency fee payers. *Id.* at **10-14.[2]

C. Four of the five petitioners appealed the district court's rulings, both on the two merits issues and on the court's refusal to appoint their attorneys as class counsel, to the United States Court of Appeals for the Second Circuit. Following briefing and argument, that court issued its ruling on June 28, 2010, affirming in part and reversing in part. On the merits issues, the court affirmed the district court's holding that CSEA's method of calculating the chargeable percentage of its disbursements to its local affiliates was constitutionally permissible. Pet. App. at 17a-22a. On the chargeability of organizing expenditures, the court of appeals agreed with the district court that under the circumstances CSEA's expenditures to organize competing private-sector workplaces were germane to its collective-bargaining efforts on behalf of its existing public-sector bargaining units. The court nonetheless reversed the district court's grant of summary judgment to defendants on this point on the ground that it had not been shown that the four plaintiff-appellants, all probation officers, could themselves benefit from the union's organizing efforts that were focused on other occupations represented by CSEA. *Id.* at 8a-17a.

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[2] The court also rejected the individual claims advanced by four of the plaintiffs that their First Amendment rights had been violated because they had not received copies of CSEA's 2005-06 agency shop notice – which had been mailed out to all nonmember agency fee payers at a time when the plaintiffs were still union members. The court held that the four plaintiffs had suffered no cognizable injury, as their requests to be treated as agency fee objectors for 2005-06 had been honored. 2007 WL 2126286 at *14. Plaintiffs did not raise this issue on appeal.

As to the class-counsel issue presented by this Petition, the Second Circuit affirmed the district court's ruling in a brief footnote. *See id.* at 7a n.3. What the court found dispositive was that the district court's conclusion that "Foundation counsel are clearly in conflict with the objectives of plaintiffs and the putative class and cannot act in their best interests" was "well grounded in the record." *Id.* That being the case, the court of appeals held that "the district court did not abuse its discretion in declining to appoint the Foundation as class counsel." *Id.* Chief Judge Jacobs, who wrote separately to take issue with the majority's reasoning on one of the merits issues, specifically stated his agreement "entirely" with the panel's holding "that plaintiffs' counsel should not be appointed as class counsel." *Id.* at 23a (Jacobs, C.J., concurring).

ARGUMENT

I. THIS CASE PRESENTS NO UNRESOLVED LEGAL ISSUE BUT ONLY THE FACT-BOUND QUESTION OF WHETHER THE DISTRICT COURT'S DISCRETIONARY REFUSAL TO APPOINT PETITIONERS' LAWYERS AS CLASS COUNSEL WAS "WELL GROUNDED IN THE RECORD"

A. Rule 23(g) of the Federal Rules of Civil Procedure provides that if a court certifies a class under Rule 23, it "must appoint class counsel." Fed. R. Civ. P. 23(g)(1). When there is only one applicant for appointment as class counsel, Rule 23(g)(2) establishes the following standard for determining whether that applicant may be appointed: "the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)." Rule 23(g)(4), in turn, describes the "duty of class counsel" as follows: "Class counsel must fairly and adequately represent the interests of the class." As the district court recognized,

this duty imposes on class counsel "an obligation that may be different from the customary obligations of counsel to individual clients." Pet. App. at 40a (citing Fed. R. Civ. P. 23(g)(1) advisory committee's note, 2003 amendments).

The determination under Rule 23(g) whether an applicant for appointment as class counsel will "fairly and adequately represent the interests of the class" is a matter within the district court's discretion. *See, e.g., International Union, United Auto. Workers v. General Motors Corp.*, 497 F.3d 615, 625-26 (6th Cir. 2007). And the question of "[w]hat constitutes adequate representation is a question of fact that depends on the circumstances of each case." 7A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1765, at 322 (3d ed. 2005). In this case the trial judge determined, based on an abundant factual record, that petitioners' counsel could not serve as counsel for a class consisting of public-sector employees because in litigating the case counsel were pursuing the objectives of the organization that employed them and that was funding the litigation, which objectives were in conflict with the interests of the class they sought to represent. Specifically, the court found – based in large part on internal documents of the National Right to Work Foundation produced in discovery – that the Foundation's objective in funding such class-action litigation against public-sector unions was "to defend the interests of the taxpayers who are forced to pay those public employees' salaries and benefits by weakening the ability of unions to achieve gains for public sector employees that entail costs to taxpayers, and making it harder for unions to resist privatization of public-sector jobs including those of the class members the Foundation seeks to represent here." Pet. App. at 39a. The court quoted the Foundation's own literature in describing its efforts in such litigation as "sending 'Foundation attorneys' into

battle ... to 'strik[e] a blow for taxpayers everywhere.'" *Id.* at 41a. That objective, the court appropriately concluded, was contrary to the economic interests of the public employees whom those attorneys sought to represent. And the court pointed to the discovery documents as well as counsel's conduct of the litigation itself in rejecting counsel's attempts to separate themselves from their employer. *Id.* at 40a-43a.

The district court's holding thus rests entirely on the uncontroversial principle that counsel cannot represent a class if they are pursuing objectives that are contrary to the interests of that class. If indeed, as the district court held, petitioners' counsel were guided, in conducting this litigation, by their employer's professed interest in furthering the interests of *taxpayers* – to the detriment of the jobs, wages, and benefits of the public employees who made up the class counsel sought to represent – then it is clear not only that the district court was acting well within its discretion in declining to appoint them as class counsel, but indeed that any other decision would have been an abuse of discretion.

That being the case, the only remaining issue presented by the Petition is the factual question of whether – as the Second Circuit held – the trial court's decision was indeed "well grounded in the record." Pet. App. at 7a n.3. That question is readily answerable in the affirmative, on the basis of considerable record evidence that was discussed by the district court, as well as much additional evidence that was not. In any event, however, the question whether the facts that were before the district court supported the decision it made is not an issue of the kind that this Court sits to review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In short, this case presents no significant legal issue

requiring this Court's consideration. The legal principle upon which the district court and the Second Circuit based their determinations is beyond controversy, and the fact-bound question of whether they were right about what the record showed is not one for this Court to review.

B. Petitioners attempt to conjure up a significant legal issue by characterizing the district court's holding as based on the Foundation's "views on public issues," Pet. at 24, and thus as a holding that would largely preclude public interest organizations from supporting class-action lawsuits. *E.g.*, *id.* at 4, 19, 23-25. But that simply misstates the basis for the court's holding. The court found that Foundation counsel could not represent a class of public-sector employees not because of the Foundation's ideology or views, or whether class members "might not agree with every ideological position taken by the Foundation over the years." *Id.* at 23. Nor was the problem "[t]hat the Foundation opposed higher taxes." *Id.* at 24. Rather, the district court's concern was that the Foundation was funding this litigation, and its employee/attorneys were conducting the litigation, with the aim of attaining objectives that were diametrically opposed to the economic interests of the members of the class they sought to represent.[3]

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[3] The district court's conclusion that in this case the Foundation and its counsel were using plaintiffs and the public-employee class as "pawns in litigation that is being conducted in the interest of taxpayers," Pet. App. at 39a, was well illustrated by evidence that even some of the named plaintiffs were unaware of and surprised to learn of the Foundation's litigation objective of holding down public-sector wages in the interests of the taxpaying public. For example, one of the plaintiffs testified in his deposition as follows:

Q [D]o you think your salary as a probation officer is too low, too high or about right?

A Too low.

Q Too low?

Nothing in the district court's holding would prevent any public-interest organization from funding class-action litigation, as long as the organization's objectives in doing so were not in conflict with the interests of the class. But it most assuredly is the case that any other public-interest organization would face exactly the same problem that the Foundation faced here if its objective in assigning its attorney/employees to bring a class action under Rule 23 was demonstrably at odds with the interests of the members of the putative class, and the attorneys' actions in litigating the case demonstrated their adherence to that objective rather than to the interests of the class.

II. CONTRARY TO PETITIONERS' CHARACTERIZATION, NO CONSTITUTIONAL ISSUE OR SPLIT IN APPELLATE AUTHORITY IS PRESENTED

Notwithstanding petitioners' attempt to portray it as

A Uhm-uhm, too low.
Q You think you ought to be paid more for what you do?
A Yes.
Q Even if it costs the taxpayers of Monroe County a little bit more?
A Sure.
Q Do you know whether the Right to Work Foundation brings lawsuits like this against public employee unions in order to strike a blow for taxpayers everywhere?
A I wasn't aware.
Q You've never heard that?
A No.
Q Is that your goal in this lawsuit, to strike a blow for taxpayers?
A No.

CA2 App. at 141-42. The district court also cited evidence that plaintiffs had been unaware that their attorneys intended to seek not only punitive damages but the "punitive" remedy of restitution of the full agency fee, including the amounts that were indisputably chargeable to objecting feepayers. Pet. App. at 38a & n.3.

such, this case raises no issue of a split in appellate authority, and certainly none involving a constitutional issue.

A. Petitioners first endeavor to portray the Second Circuit's affirmance of the district court as part of a circuit split based on *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989).

In *Gilpin* the Seventh Circuit recognized that litigation of this kind could be used as a vehicle to impair the ability of a union to protect the wages, benefits, and working conditions of the employees it represents, union members and nonmembers alike, and that litigation pursued with that objective was consistent only with the aims of those nonunion employees who were hostile to unions on political and ideological grounds – but not with the interests of "free riders," who were happy to reap the benefits of union representation but declined to become union members because they did not want to pay any more for that representation than they were forced to. *Id.* at 1313. In *Gilpin*, the plaintiffs and their counsel had sought the same remedy of "restitution" – *i.e.*, repayment to all agency feepayers of the entire agency fee, including the portions indisputably germane to collective bargaining – that petitioners and their counsel sought here. Writing for the court, Judge Posner explained that such a "punitive" litigation objective was consistent only with the interests of those members of the putative class who wanted to "weaken and if possible destroy the union," but not with the interests of the "free rider" class members who "have no desire to ruin the union or impair its ability to represent them effectively." *Id.* That "potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately." *Id.*

Contrary to petitioners' formulation, the Seventh

Circuit's holding that a class could not be certified rested *not* on "the ideology of the sponsoring public-interest legal organization," Pet. at 19, but rather on the litigation objectives pursued, on behalf of the plaintiffs and the putative class, by the attorneys employed by that organization. *See* 875 F.2d at 1313 ("The 'restitution' remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with – and only with – the aims of the first type of employee."). Judge Posner's analysis in *Gilpin* is, in point of fact, a straightforward application of this Court's teaching in *Hansberry v. Lee*, 311 U.S. 32 (1940), which held that a class action could not be brought to enforce a racially restrictive covenant on behalf of a class of landowners, of whom some wanted the covenant enforced and others did not.

Notwithstanding petitioners' attempt to create the appearance of a circuit split, there is in fact no disagreement among the circuits about the holding of *Gilpin*. As petitioners point out, Pet. at 18-19, *Gilpin* has been relied on by several other circuits presented with similar factual situations. *See Weaver v. University of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992); *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305-06 (4th Cir. 1991); *see also Pilots Against Illegal Dues v. ALPA*, 938 F.2d 1123, 1134 (10th Cir. 1991) (citing *Gilpin* with approval). Petitioners are wrong, however, in implying that the District of Columbia and Ninth Circuits have disagreed with *Gilpin*. Pet. at 19 & n.32.

Petitioners' citation of *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995), is not at all on point. While in that case the D.C. Circuit reversed a district court decision declining to certify a class, the issue had nothing to do with *Gilpin*, to which the court made no reference. *See id.* at 1378. And the Ninth Circuit case

petitioners cite, *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003), merely found *Gilpin* inapplicable on the facts of the case; the court determined that the fact that the plaintiffs sought the punitive remedy of restitution was irrelevant because that remedy was not available under Ninth Circuit caselaw. *Id.* at 895-96. But the court made clear its agreement with *Gilpin*'s basic holding, by approving the district court's willingness to reconsider class certification should the plaintiffs attempt to change existing law through the en banc process or by petition to this Court. *Id.* at 896.[4]

To the extent there exists any disagreement between *Cummings* and the other courts cited, it is at most about whether – as suggested by dicta in the closing paragraph of the Ninth Circuit's analysis, 316 F.3d at 896 (quoted in part in Pet. at 20), and by an unpublished decision of the same court, *Wagner v. Prof'l Eng'rs*, 3 Fed. App'x 594, 595 (9th Cir. 2001) (quoted in Pet. at 21) – the existence in a particular bargaining unit of the "free rider" type of nonunion member described by Judge Posner can properly be assumed, or whether it must be proved up through evidentiary submissions.

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[4] Similarly, most of the district court cases cited by petitioners, Pet. at 19 n.32, do not call into question the holding of *Gilpin* but rather distinguish that case on the basis of the particular facts presented – for example, that the plaintiffs had not sought "restitution" or any other punitive remedy, *Leer v. Washington Educ. Ass'n*, 172 F.R.D. 439, 446-47 (W.D. Wash. 1997); *Lutz v. International Ass'n of Machinists*, 196 F.R.D. 447, 453 (E.D. Va. 2000); *Baird v. California Faculty Ass'n*, No. CIV S-00-0999, 2000 WL 1028782, at *5 (E.D. Cal. July 13, 2000), that the punitive remedy sought was legally unavailable, *Friedman v. California State Employees Ass'n*, No. CIV S000101, 2000 WL 288468, at *6 (E.D. Cal. Mar. 15, 2000) – or because the court required empirical evidence of diverging interests within the class, *Swanson v. University of Hawaii Prof'l Assembly*, 212 F.R.D. 574, 577 (D. Haw. 2003).

That evidentiary question, however, is not presented here. The district court rejected the Foundation attorneys as class counsel not because of any generalized view about the interests of "free rider" nonmembers, but because the court found that the Foundation's litigation objective of holding down public-employee salaries and benefits in the interest of the taxpaying public was directly at odds with the economic interests of the public employees who made up the class. Far from "sheer speculation," as petitioners would have it, Pet. at 20, that determination rested on the self-evident proposition that most public employees would not see it in their interest to be paid less. Such a conclusion based on experience and common sense is one that a judge surely can reach without requiring evidentiary submissions.[5]

In short, the Second Circuit's decision in this case is in no way "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), so as to require this Court's attention.

B. Nor does the district court's refusal to appoint petitioners' attorneys as class counsel raise a First Amendment issue of any kind, let alone one involving a conflict in authority.

It bears emphasis, in the first place, that the issue is not petitioners' right as individual litigants to choose their own counsel for litigation of individual claims. Rather,

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[5] And, in any event, it is a conclusion that indeed has evidentiary support in the district court record. Even one of the named plaintiffs testified on deposition that he thought he should be paid more "[e]ven if it costs the taxpayers of Monroe County a little bit more." *See supra* note 3. And several plaintiffs testified that part of what led them to leave the union was their dissatisfaction with its acceptance of a longer work week and its insufficiently vigorous advocacy on issues of overtime and salaries, *see* CA2 App. at 103, 125 – benefits that would have involved additional costs to taxpayers.

the question is whether petitioners' Foundation-employed counsel can represent, in a class action, people who have not sought their representation, *i.e.*, absent class members. Whatever misunderstanding there may have been on this point in the district court's initial order was cleared up in the court's subsequent order of December 21, 2006, which expressly affirmed that, although plaintiffs' attorneys "were not qualified to serve as class counsel," "[n]othing in this Court's decision precludes the Foundation attorneys from representing the plaintiffs in their individual capacities." Pet. App. at 55a; *see also id.* at 56a-57a. And indeed petitioners' Foundation-employed counsel continued to represent the petitioners in litigating their claims as individuals.

The issue, accordingly, is not petitioners' right to "cho[o]se to associate themselves with lawyers whose work is funded by the Foundation," Pet. at 29-30, but rather whether representation by those lawyers of a class certified under Rule 23 will "afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). In this regard, the "courts have recognized that the attorneys for the class perform a major role in assuring that the representation satisfies due-process standards." 7A *Federal Practice and Procedure* § 1769.1, at 442.

These due process considerations, embodied in the requirement of Rule 23(a)(4) that the class representatives "will fairly and adequately protect the interests of the class," and in the similar duty imposed on class counsel by Rule 23(g)(4), preclude the "selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent." *Hansberry*, 311 U.S. at 45. Petitioners' suggestion that this application of Rule 23 constitutes impermissible "viewpoint dis-

crimination," Pet. at 16, borders on the frivolous. The district court's determination under Rule 23(g) that class counsel could not be appointed if their litigation objectives were at odds with the interests of the class they purported to represent is well-grounded in the compelling state interest in ensuring the protections of due process to persons who are to be bound by the judgment in a lawsuit in which they have not personally participated.[6]

III. IN LIGHT OF THE SECOND CIRCUIT'S MERITS HOLDINGS, CLASS CERTIFICATION IS NOW IRRELEVANT IN THIS LITIGATION

This Court's determination whether to grant the Petition turns principally, of course, on the importance of the legal issue presented – and as we have already shown, the Petition presents no question of law that merits this Court's consideration. It also bears mention, however, that in light of the Second Circuit's disposition of the merits issues the class counsel question raised by the Petition is of little or no consequence even for this litigation itself.

Of the two merits issues petitioners raised on appeal, the Second Circuit affirmed the district court's judgment in favor of defendants with respect to CSEA's use of the local union presumption. Pet. App. at 17a-22a. On the other issue – the chargeability of organizing expenditures – the Second Circuit agreed with the district court that the expenditures at issue were germane to collective bar-

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[6] It should go without saying that, contrary to petitioners' characterization, the district court did not decline to appoint petitioners' counsel because "the court disagree[d] with the [ideological views of] the supporting organization." Pet. at 17. Judge Telesca's opinion offers no clue as to whether he agrees or disagrees with the Foundation's efforts to hold down public employee salaries and benefits; rather, the court's decision was based on the obvious proposition that public employees – whether union members or not – would be unlikely to find such efforts in their interests.

gaining, but reversed on the ground that "*these particular plaintiffs* ... as probation officers ... derive little meaningful benefit" from CSEA's efforts to organize private-sector workplaces in the developmental disability, food service, and courier industries. Pet. App. at 14a (emphasis in original).

Neither party has sought review by this Court of the Second Circuit's merits determinations. Accordingly, any question of class certification with respect to the local presumption issue – as to which petitioners and the class they wish to represent no longer have any claim – is now moot. While at least technically that may not be so with respect to the organizing issue, the Second Circuit's resolution of this issue makes clear that – even apart from the question of the adequacy of plaintiff's counsel to serve as class counsel – the class certification sought by plaintiffs could not be granted. Because the statewide class of all CSEA-represented agency fee payers plaintiffs sought to certify, *see* Pet. at 9, would include many employees who, because of the nature of their employment, could under the Second Circuit's ruling lawfully be charged for the union's organizing expenditures in the developmental disability, food service, and courier industries, the putative class would fail the "commonality" requirement of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (issues must "turn on questions of law applicable in the same manner to each member of the class").[7]

Thus, as it is "evident that the resolution of the [question presented by the Petition] could not change the result reached below," it would be appropriate to deny

[7] The same analysis would apply with respect to the subclass of agency fee objectors sought by plaintiffs. *See* Pet. at 9. That subclass similarly would include CSEA-represented workers employed in a variety of jobs.

the Petition even if it otherwise had merit. Eugene Gressman *et al.*, *Supreme Court Practice* 248 (9th ed. 2007).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

No. 10-719

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY AND LAURA J. SWARTZENBERG,
Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000; AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE PETITION PRESENTS A LEGAL, NOT A FACT-BOUND, QUESTION FOR WHICH RESPONDENTS CITE NO AUTHORITY TO SUPPORT THE REJECTION OF CLASS COUNSEL PROVIDED BY A LEGAL AID ORGANIZATION.

Respondents Civil Service Employees Association, Local 828; Civil Service Employees Association,

AFSCME, Local 1000; and American Federation of State, County and Municipal Employees, AFL-CIO (collectively "CSEA") argue that the Petition for Writ of Certiorari only presents a "fact-bound question" of whether the refusal to appoint Plaintiffs' attorneys as class counsel was "well grounded in the record." Brief in Opposition ("Opp.") at 1, 7-11.

The Petition neither asks this Court to review evidence nor to discuss specific facts. The issue presented is not whether the lower court's decision denying the application of class counsel was "well grounded in the record." Instead, the issue is whether Federal Rule of Civil Procedure 23(g) ("Rule 23(g)") or the First Amendment permits the type of "fact-bound" inquiry in which the district court engaged and the Second Circuit affirmed. That is a legal question—indeed, a constitutional one going to the heart of freedom of speech and association for purposes of litigation—which this Court should review.

CSEA does not discuss or respond to the actual question of law the Petition presents. CSEA cites no authority supporting the lower court's decision to consider the ideological views of the public-interest legal aid organization in determining an individual counsel's ability to fairly and adequately represent the class under Rule 23(g).

Neither does CSEA respond to *amici curiae*'s argument that this case raises a critical issue for attorneys employed by, or affiliated with, public-interest or legal services organizations, and that review by this Court is necessary to ensure that federal courts do not engage in an ideological conformity check to determine which political viewpoints are appropriately orthodox in future Rule 23(g) proceedings. *See Brief Amicus Curiae* of Center for Constitutional

Jurisprudence, Atlantic Legal Foundation, and Mackinac Center for Public Policy in Support of Petitioners.

Although the Rule 23(g) determination whether an attorney seeking appointment as class counsel will "'fairly and adequately represent the interests of the class' is a matter within the district court's discretion," Opp. at 8, application of the wrong legal standard is an abuse of discretion. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). The Petition asks the Court to determine the proper legal standard. The only issue presented is the legal question whether a district court may refuse to appoint class counsel on the basis of the views of the supporting legal aid organization, rather than on an assessment of the attorneys' actual experience and conduct in litigating the case.[1]

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[1] The only "inappropriate" conduct of Plaintiffs' attorneys the district court suggested was the request for full restitution and punitive damages contained in the original complaint. Pet. App. at 33a, 38a-39a. The Petition explains the legitimate reasons for the initial request for these remedies and their subsequent abandonment prior to the district court's ruling on the application for appointment as class counsel. Pet. at 9. Yet, the district court justified its denial of the application as if those remedies were still in play. Pet. App. at 39a; *accord* Opp. Pet. at 4, 9, 11.

The more limited relief actually sought when the district court denied class counsel status to Plaintiffs' attorneys was something far different from that described by CSEA and the court below. The requested relief was not "diametrically opposed to the economic interests of the members of the class [Plaintiffs] sought to represent." Opp. at 10. Instead, the supplemental pleadings sought only: 1) adequate First Amendment due process notice under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), which is in all nonmembers' interest; and 2) constitutionally chargeable fees that excluded the nonchargeable organizing costs, which is in the economic interest of the subclass of objectors. CA2 App. at 293-94, 305-07.

II. RESPONDENTS VIRTUALLY CONCEDE A SPLIT AMONG THE CIRCUITS ON WHETHER SPECULATIVE CONFLICTS CAN BE THE BASIS OF RULE 23 DECISIONS.

Although arguing that no constitutional issue or split in appellate authority is presented, Opp. at 11-17, CSEA eventually concedes a split. "Notwithstanding petitioners' attempt to create the appearance of a circuit split, there is in fact no disagreement among the circuits about the holding of *Gilpin* [v. *AFSCME*, 875 F.2d 1310 (7th Cir. 1989)]." Opp. at 13. However, *Gilpin* and the circuits that followed it, including the Second Circuit, did so on the assumption that within every nonmember class there are two conflicting groups: 1) those who are hostile to unions on political and ideological grounds and want to weaken and, if possible, destroy the union; and 2) those who are happy to reap the benefits of union representation but have declined union membership because they do not want to pay any more for that representation than they are forced to. Opp. at 12-13.

Those circuits, including the Ninth Circuit, that refuse to follow *Gilpin* do so because they require empirical evidence of the existence of the two types of nonmembers and a concrete divergence of interests within the class before they will find conflict that will deny class certification or appointment of class counsel. See Pet. at 19-21. As CSEA admits, there is a split among the circuits on whether speculative conflicts can be the basis of Rule 23 decisions or whether empirical evidence of diverging interests within the class is required.

> To the extent there exists any disagreement between [the Ninth Circuit] and the other courts cited, it is at most about whether . . . the existence in a particular bargaining unit of the "free rider" type of nonunion member . . . can properly be assumed, or whether it must be proved up through evidentiary submissions.

Opp. at 14.

That the Ninth Circuit and others, *see* Pet. at 19-21, correctly reject assumptions of class conflict is highlighted by the nature of the speculation the court below accepted. CSEA uses that speculation to justify its opposition to the Petition. In numerous places, both the district court and CSEA accept what they see as "the obvious proposition that public employees—whether union members or not—would be unlikely to find [the Foundation's motives for taxpayers of holding down public employee salaries and benefits] in their interests." Opp. at 17 n.6; *accord id.* at 9, 15; Pet. App. at 36a-39a, 41a.

However, this is not an obvious or self-evident proposition. As both Second Circuit Chief Judge Jacobs, Pet. App. at 27a, and *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 520 (D.N.M. 2004) recognized, public employees are also taxpayers. *See* Pet. at 28 & n.42. This Court has recognized that the "worker and union cannot be said to speak with one voice." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991); *accord Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). Moreover, whatever the indirect benefit for taxpayers might be, counsel's successful goal of reducing the union fees objecting nonmembers must pay will provide an immediate and direct increase in that subclass' take-home pay.

III. COURTS ENJOY MANY WAYS TO PROTECT ABSENT CLASS MEMBERS OTHER THAN BY DISQUALIFYING CLASS COUNSEL FOR IDEOLOGICAL REASONS.

CSEA cites *Hansberry v. Lee*, 311 U.S. 32 (1940), to support the lower courts' rejection of Plaintiffs' attorneys as class counsel. *See* Opp. at 13, 16. *Hansberry* does not forbid class actions. It simply holds that some class actions will not bind a subsequent class where class members have demonstrated direct and diametric opposition to the central goal of the previous lawsuit.[2] As the Fifth Circuit has held, neither does it forbid class actions in every case in which a class member might disagree with the plaintiffs' assertion of rights. In many cases, some class members will wish to assert their rights while others will not, but that does not defeat class certification or the appointment of class counsel. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 486-88 (5th Cir. 1982).

Hansberry mandates concern for adequate protection of absent class members, but that concern does not preclude certification. As a device by which the claims of many individuals can be resolved simultaneously, the class suit both eliminates the possibility of repetitious litigation and, as here, provides individuals with a method of obtaining redress for claims that would otherwise be too small to warrant individual litigation. *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

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[2] In fact, Rule 23 makes no mention of conflicts. The rule's requirement is that the class be "fairly and adequately" represented. Thus, Rule 23(g)(4) states: "Class counsel must fairly and adequately represent the interests of the class."

Courts enjoy many ways to protect absent class members other than by disqualifying class counsel for ideological reasons that are not legally valid. For example, under the notice and opt-out procedures of Rule 23(b)(3) and 23(c)(2), an absent class member may evaluate his position in the class and decide whether to avail himself of the representation offered by class counsel. Moreover, the district judge can assure fairness of representation through his ability to decertify or create subclasses.

IV. EVEN AFTER THE MERITS DECISION, THERE IS A SIZABLE SUBCLASS ENTITLED TO DAMAGES ON THE SUCCESSFUL CHARGEABILITY CLAIM.

CSEA misleads the Court with the suggestion that the Second Circuit's merits determinations[3] make class certification moot, thereby diminishing the importance of this case. Opp. at 17-18. This is simply untrue.

Hundreds, if not thousands, of public employees were denied the benefit of class relief solely because the district court made a political and philosophical judgment about the supporting public-interest organ-

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[3] The Second Circuit affirmed the district court's judgment in favor of CSEA with respect to CSEA's use of the local union presumption in its *Hudson* notice sent to all nonmembers, Pet. App. at 17a-22a, but reversed on the chargeability of organizing expenses to objecting nonmembers on the grounds that Plaintiff probation officers "derive little meaningful benefit" from CSEA's efforts to organize private-sector workplaces in the developmental disability, food service, and courier industries. *Id.* at 14a-17a.

ization.[4] Even after the merits decision, there is a sizable subclass entitled to damages on the successful chargeability claim. That subclass consists of all objecting nonmember probation officers statewide and other objecting nonmembers not in the developmental disability, food service, and courier occupations on which the constitutionally nonchargeable organizing activities were targeted. Although on remand the subclass of objectors will have to be narrowed to eliminate objectors in those three occupations, the restructured subclass will still have a common claim on which its members will be entitled to a refund of that portion of their forced fees CSEA used for organizing since November 2002.[5]

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[4] Plaintiffs requested a class of all public-sector employees represented by CSEA who were not union members for the *Hudson* notice claim, and a subclass of nonmembers who had specifically objected to the union's use of their money for nonbargaining activities for the "nonchargeability of organizing" claim. Pet. at 9. The request for a subclass of objectors is faithful to this Court's decision in *Machinists v. Street*, 367 U.S. 740, 774 (1961), which relied on *Hansberry* in limiting relief for the exaction of nonchargeable funds to those who specifically object to the exaction.

[5] Resolution of the question the Petition presents would change the result reached below in another way. Like the subclass of objectors, there remain a large number of nonmembers not employed in the developmental disability, food service, and courier occupations. Although on remand a subclass of the nonmembers not in those three occupations will have to be created, this subclass will still have a common claim. Its members will be entitled to a new *Hudson* notice with correct information that organizing is not a chargeable expenditure, a recalculation of the chargeable and nonchargeable amounts, and a renewed opportunity to object and receive the nonchargeable portion back with interest. *Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003). Certification of the full class will also benefit CSEA

V. THE LOWER COURT'S ANALYSIS OF THE POLITICAL POSITIONS OF THE PUBLIC-INTEREST ORGANIZATION PAYING FOR THE LEGAL REPRESENTATION IS QUINTESSENTIAL VIEWPOINT DISCRIMINATION

CSEA contends that the district court's refusal to appoint Plaintiffs' attorneys as class counsel raises no "First Amendment issue of any kind." Opp. at 15. It further claims that Petitioners' suggestion that the district court engaged in "impermissible 'viewpoint discrimination' . . . borders on the frivolous." *Id.* at 16-17. However, the district court analyzed the political positions of the public-interest organization paying for the representation and then determined that those positions are not in the best interests of members of the proposed class. Pet. App. at 35a-37a, 39a. That is quintessential viewpoint discrimination. As *amici* explain, "[i]nterpreting Rule 23 to permit such an analysis will necessarily require federal district courts to disrupt relationships that this Court has determined are protected by the First Amendment and will further require those courts to determine what political viewpoints are appropriately orthodox in particular class action litigation." *Amicus* at 9-10, *see id.* at 9-12; Pet. at 29-34.

As *amici* also recognize, this case raises a critical issue for attorneys employed by or affiliated with public-interest legal organizations. *Amicus* at 3.

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by binding all nonmembers to the ruling upholding CSEA's use of the "local presumption" in its *Hudson* notice.

Because this Court recognizes that civil rights claimants benefit from the class action device,[6] addressing constitutional injustices through public-interest class actions is an important engine of accountability in American public life.[7] In general, civil rights litigation has been unattractive to the private bar. Consequently, civil rights laws historically have been enforced by groups from the NAACP Legal Defense Fund to the ACLU, to the National Right to Work Legal Defense Foundation, along with other public-interest legal aid organizations.[8] As Justice Marshall noted: "[T]he phrase 'public interest law' . . . refer[s] to the diffuse efforts aimed at providing legal resources for the unrepresented. . . . [P]ublic interest law is necessary to create a balance in the legal system, to assure that all interests get a fair chance to be heard with the help of a lawyer."[9] Thus, public-interest legal organizations have become an estab-

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[6] *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977); *see also* Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 Colum. J.L. & Soc. Probs. 133, 135 (2003).

[7] Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. Rev L. & Soc. Change 487, 499 (1999); *cf.* William H. Simon, *The Practice of Justice: a Theory of Lawyers' Ethics* 128 (Harv. Univ. Press 1998) (tracing public-interest law back to Justice Brandeis and noting that Brandeis' work was "designed to level the playing field by providing representation to underorganized interests"); *id.* at n.55.

[8] Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 951 (1978).

[9] Justice Thurgood Marshall, Financing Public Interest Law: The Role of the Organized Bar, Speech before the Amer. Bar Ass'n Activities Section Award of Merit Luncheon (Aug. 10, 1975), *in "Public Interest" Litigation* 415, 416 (Practicing L. Inst. 1975).

lished social movement that plays a distinctive role in the American legal system.[10]

As a general matter, to allow federal district courts to determine whether the viewpoints of public-interest legal organizations providing attorneys to plaintiffs and class members are consonant with the presumed and speculative viewpoints of class members is to invite suppression of those individuals' rights. It will also diminish the presence of those organizations that use litigation as a means of political expression in the American legal system, a type of political expression which this Court has protected since at least *NAACP v. Button*, 371 U.S. 415 (1962). In this case, the rulings of the courts below on this issue also are an assault on the fundamental First Amendment rights of employees to vindicate their rights through litigation.

CONCLUSION

The Petition raises an important question of law affecting the whole public-interest legal aid community: whether a district court can consider the ideological views of the legal aid organization that is providing the attorneys for a class action in deciding whether those individual attorneys can fairly and adequately represent the class. Review by this Court is necessary to ensure that federal courts do not conduct unbounded inquiries into the political and ideological viewpoints of such legal organizations in making decisions about class counsel under Rule 23.

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[10] Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. Rev. 1591, 1592 (2006).

For the foregoing reasons, Petitioners urge the Court to grant their petition, issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and set the case for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, ATLANTIC LEGAL FOUNDATION, AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Are attorneys who have been retained by class members automatically disqualified from serving as class counsel under Federal Rule of Civil Procedure 23 if the District Court is of the opinion that the political viewpoint of the public interest organization with whom the attorney is associated is not shared by, or not in the interest of, members of the class?

2. May a District Court assume that an attorney will violate the Rules of Professional Conduct simply because the attorney is employed by a public interest organization?

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II. THE COURT SHOULD RESOLVE THE QUESTION OF WHETHER RULE 23 REQUIRES OR EVEN PERMITS A CONTENT-BASED ANALYSIS OF THE SPEECH OF THE PUBLIC INTEREST ORGANIZATION WITH WHOM PROPOSED CLASS COUNSEL IS ASSOCIATED 9

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IDENTITY AND INTEREST OF AMICI CURIAE

The Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the proper limit on those powers, including the judicial power. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides legal counsel, without fee, to parents, scientists, educators, and other individuals and trade associations. The Atlantic Legal Foundation's mission is to advance the rule of law in courts and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents were lodged with the clerk. Amici have also given notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: justice prevails only in the presence of reason and in the absence of prejudice. Accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy. *Amicus Curiae's* leadership includes distinguished legal scholars and practitioners from across the legal community. The Foundation's leadership has decades of experience in the practice of corporate and criminal law, as well as the study of legal ethics. Of particular significance here, the Atlantic Legal Foundation has served as counsel for student plaintiffs in a number of cases involving constitutional implications of "compelled speech" through mandatory fees, including *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); and *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982);.

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute that advances policies fostering free markets, limited government, personal responsibility and respect for private property. The Center is a 501(c)(3) organization founded in 1988. In 2009, the Center opened the Mackinac Center Legal Foundation and began representing public-interest legal clients.

In pursuing their missions, *amici* employ attorneys or work with volunteer attorneys to represent clients in litigation before the state and

federal courts. In this role, *amici* and their employed and volunteer attorneys are directly affected by the decision of the courts below. By disqualifying attorneys from representing clients in certain types of cases based solely on the political viewpoint of the public interest organization with which the attorneys are associated, the court below presumed a violation of the rules of professional conduct and imposed a content-based restriction on speech. This Court's intervention is required to settle the important and troubling questions raised by the decision below.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This case raises a critical issue for attorneys employed by or affiliated with a public interest or legal services organization. The court below assumed that merely because an attorney was associated with a public interest organization, the attorney would violate the rules of professional conduct. Using that assumption, the court then proceeded to analyze the political viewpoint of the public interest organization to decide whether, in the court's opinion, that viewpoint would coincide with the views of the members of the class—or whether that viewpoint would be beneficial to the members of the class. The court thus used Rule 23 to decide what viewpoints should be orthodox. The court would never have reached such a point, however, without the unwarranted assumption that attorneys affiliated with public interest organizations would violate the rules of professional conduct. Review by this Court is necessary to determine whether this ideological conformity check will be a necessary step in future Rule 23 proceedings.

I. THE CASE RAISES THE IMPORTANT QUESTION OF WHETHER ATTORNEYS AFFILIATED WITH PUBLIC INTEREST ORGANIZATIONS SHOULD BE PRESUMED TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT

The Circuit Court conflated the attorneys employed by the public interest organization and the organization itself. Public interest organizations, however, are not attorneys and do not practice in the federal courts. These organizations are generally nonprofit corporations and such corporations cannot practice law. Instead, those organizations employ attorneys or affiliate with volunteer attorneys to represent individuals in the courts. Although the public interest organization may be paying for the representation it is not the represented party and the attorney's professional obligations are owed only to the client that is the party to the litigation.

There are cases from the early part of the last century that objected to the model of corporations hiring attorneys to represent third parties (*e.g.*, *In re Cooperative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910)). As the California State Bar Standing Committee on Professional Responsibility and Conduct noted, however, those decisions have "not outlasted the evolution of prepaid medical and legal service programs which, under these authorities, would theoretically violate the prohibition against corporations practicing law." Cal. Eth. Op. 1987-91, 1987 WL 109707 at *2.

The California Bar's opinion came in response to the question of whether an insurance company can employ attorneys to represent their insureds. Since

the attorneys would be employees of the insurance corporation, the practice would apparently come within the prohibition outlined in cases such as *In re Cooperative Law*. The Bar, however, recognized that much had changed in the years since those early decisions. The Bar opinion eschewed any bright line distinction that hinged on the employment relationship: "the mere fact that the lawyers are employees of Insurance Company does not necessarily compromise the attorney's independent professional judgment." *Id.* at *3. The opinion further noted that "in absence of a conflict of interest . . . *it cannot be presumed that simply because the attorneys . . . are salaried employees of Insurance Company that they will act unethically or will otherwise sacrifice their professional obligations to the insureds.*" *Id.* at *4 (emphasis added). That assumption, however, is the basis of the lower court's decision in this case.

This California Bar opinion was followed by the recent California Court of Appeal decision in *Gafcon, Inc. v. Ponsor & Associates*, 98 Cal. App. 4th 1388 (2002). That case brought the issue of insurance companies' hiring of staff lawyers from the theoretical basis of the State Bar opinion to the reality of the courtroom. Central to the court's holding was its view that the nature of an attorney's employment did not change his or her ethical obligations. "All lawyers, whether employed by a corporation or by an independent law firm that is retained by a corporate entity, are bound by the same fiduciary and ethical duties to their clients." *Id.* at 1412.

In reaching its holding, the *Gafcon* court reviewed how other state courts had handled this issue and found "that eight of 10 state courts addressing the issue and one federal circuit have concluded it is permissible for an attorney employed by an insurance company to represent the company's insureds." *Id.* at 1413 n.11 (noting findings by the Indiana Supreme Court reviewing the same issue). The court concluded that the employment of staff attorneys by the insurance corporation did not constitute the unauthorized practice of law by the corporation.

As noted above, the early opposition to corporations employing attorneys was based on the fear that the attorney would fail to act in the client's best interest. As one scholar put it:

> The hostility to the corporate practice of law was explained in *In re Co-operative Law Company* [198 N.Y. 479, 92 N.E. 15 (1910)]: The relation of attorney and client . . . cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client . . . . The corporation would control the litigation, the money earned would belong to the corporation and the attorney would be responsible to the corporation only.

Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1079 (1989) (footnote omitted). To guard against this danger, a number of rules of professional conduct have been promulgated.

> Even if organizations would like to control their staff attorneys, the rules of legal ethics already provide multiple protections against lay interference with an attorney's independent judgment. For example, [ABA] Rule 1.2(a) requires a lawyer to "abide by a client's decisions concerning the objectives of representation," and more specifically to "abide by a client's decision whether to accept an offer of settlement of a matter." This rule prohibits a lawyer from allowing an organization to control decisions about settlement. In addition, Rule 1.7 prohibits a lawyer from representing a client if the representation "may be materially limited by the lawyer's responsibilities . . . to a third person," such as the organization.

Id. at 1113 (footnotes omitted); *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374 (1993).

New York has adopted these provisions of the model rules. New York Rule of Professional Conduct 1.8(f) prohibits accepting compensation for representing a client from a third party unless "there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship." New York Rule of Professional Conduct 1.7 similarly prohibits representation of a client in situations where it would result in the representation of differing interests. Comment 13 to this rule specifically notes that the rule does not prohibit the lawyer from being paid for the representation "from a source other than the client." *Id.* These rules apply to practice in the United

States District Court for the Western District of New York. Local Rules of Civil Procedure, Rule 83.1.

These rules protect the constitutional right of public interest organizations and other associations to provide the means for the exercise of the right of petition. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). Indeed, this Court has held that labor unions can employ staff attorneys for the purpose of providing group legal services to their members—without regard to state regulations prohibiting "corporate" practice. *E.g.*, *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *United Mine Workers*, 389 U.S. at 223; *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *see also* Simon, *supra*, at 1128-29 (noting that the Court's review of empirical evidence demonstrated that none of the harms feared from permitting group legal service arrangements had, in fact, come to pass). In the context of federal legislation the Court noted: "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Trainmen*, 377 U.S. at 7. This point is no longer open to question. As the American Bar Association has noted: "While it is unnecessary to our conclusion under the ethics rules, we note that it is now well settled, as a matter of constitutional law, that non-profit organizations may employ staff attorneys to provide legal representation to appropriate

categories of third persons." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-374.

The decision of the court below, however, resurrects these ancient objections to organizations paying for the representation of third parties. It is now well-settled that states may not "infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Trainmen*, 377 U.S. at 7. The question raised by the decision below is whether the Federal Rules of Civil Procedure may infringe on such rights. This is a question of critical importance for practice in the federal courts.

II. THE COURT SHOULD RESOLVE THE QUESTION OF WHETHER RULE 23 REQUIRES OR EVEN PERMITS A CONTENT-BASED ANALYSIS OF THE SPEECH OF THE PUBLIC INTEREST ORGANIZATION WITH WHOM PROPOSED CLASS COUNSEL IS ASSOCIATED

Having presumed that the attorneys for petitioner would violate the New York Rules of Professional Conduct regarding third party interference with the representation, the court below proceeded to analyze whether that presumed interference would result in a prohibited conflict. In making this determination, the court did not look to economic conflicts. Instead it analyzed the political positions of the public interest organization paying for the representation and then made a determination as to whether those positions might be in the best interests of the members of the proposed class. Interpreting Rule 23 to permit such an

analysis will necessarily require federal district courts to disrupt relationships that this Court has determined are protected by the First Amendment and will further require those courts to determine what political viewpoints are appropriately orthodox in particular class action litigation.

There is no question that the First Amendment protects employment of lawyers as staff attorneys for an organization not licensed to practice law for the purpose of representing third parties. The *NAACP v. Button*, 371 U.S. 415 (1963), line of cases recognize a First Amendment right to use litigation to secure civil rights. *The Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964), line of cases recognize a First Amendment right to associate for a common purpose that includes a right for unions to employ attorneys for the purpose of providing legal representation to union members. Under either theory, the Federal Rules of Civil Procedure ought not to be interpreted in a manner that might inhibit exercise of the freedom of speech and association rights at issue in the absence of a compelling governmental purpose.

Further, it is by now well established that a public interest organization's pursuit of litigation as a means of affecting public policy is a mode of expression protected by the First Amendment. As this Court noted with regard to the NAACP more than 40 years ago: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government . . . . It is thus a form of political expression." *NAACP v. Button*, 371 U.S. at 429.

Thus, the practice is protected by the First Amendment. *Id.* at 429-30; *In re New Hampshire Disabilities Rights Center, Inc.*, 130 N.H. 328, 336, 541 A.2d 208, 213 (N.H. 1988). State regulations that interfere with the right must give way unless supported by a compelling interest. *In re New Hampshire Disabilities Rights Center, Inc.*, 130 N.H. at 336, 541 A.2d at 213; Simon, *supra*, at 1126. As then New Hampshire Supreme Court Justice Souter noted:

> Organizations, their members and their staff lawyers may assert a protected first amendment right of associating for noncommercial purposes to advocate the enforcement of legal and constitutional rights of those members, or of others within a definite class whom the organization exists to serve. When such advocacy may reasonably include the provision of legal advice or take the form of litigation, the organization may itself provide legal representation to its members or beneficiaries despite State regulations restricting legal practice and the solicitation of clients, provided that the organization and its lawyers do not engage in the specific evils that the general State regulations are intended to prevent.

In re New Hampshire Disabilities Rights Center, Inc., 130 N.H. at 336, 541 A.2d at 213.

The presumption that the public interest organization's political viewpoint may interfere with the representation has already been rejected by this Court as a justification for state regulations that

interfere with First Amendment rights to pursue litigation as a mode of expression. *NAACP*, 371 U.S. at 438-39. Indeed, the Court in *NAACP* specifically rejected the fear that nonlawyers would seek to interfere in the representation as a basis for the regulation. *Id.* at 441. Yet that very fear was the basis of the lower court's ruling in this case.

If public interest organizations have a constitutional right to provide attorneys to third parties as a means of political expression, requiring the federal district courts to determine whether the viewpoints of the organization are consonant with the presumed view points of class members invites suppression of those rights. Review by this Court is necessary to ensure that federal judges are not required or permitted to inquire into the political viewpoints of class members in making decisions under Rule 23.

CONCLUSION

The decision of the court below promises to entangle the federal district courts in a thicket of constitutional problems that must result in the suppression of speech and association protected by the First Amendment. Review by this Court is necessary to avoid these problems and to reaffirm the principal that as officers of the Court, attorneys can be presumed to adhere to the rules of professional conduct.

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